

POLITICAL OFFENCES IN EXTRADITION

By

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A dissertation submitted in partial fulfillment of the requirements
for the degree of Doctor of Philosophy in the University of Michigan.

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To S. C. A.

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P R E F A C E

In presenting this work, it is the object of the writer to give a resumé of the development of the doctrine of non-extradition for political offences, to seek the legal basis for the rule, to trace the meaning of the term as it has been expounded by the judicial and administrative authorities of different countries, and to suggest a new approach to the problem. Hence cases involving diplomatic asylum have been purposely excluded, although they also concern political offenders, for the simple reason that the practice is not recognized in international law, as Secretary Fish once said: "The right of asylum, by which I now refer to the so-called right of a political refugee to immunity and protection within a foreign legation or consulate, is believed to have no good reason for its continuance, to be mischievous in its tendencies, and to tend to a political disorder." If a political refugee is accorded shelter in a foreign legation, it is because of humanitarian grounds and because local customs seem to tolerate the practice.¹

When the writer began the preparation of this work he had not anticipated the difficulties that would have to be met. The materials are widely scattered which would necessitate a search through the court reports of the various countries and their foreign relations if the work were to be exhaustive. This plan was abandoned at the start for obvious reasons, and the writer had to content himself with a less pretentious undertaking. An effort has been made, however, to include the decisions of the Swiss Federal Tribunal involving political offences not only because in Switzerland, more perhaps than any other country, has the principle of political asylum been thoroughly expounded, but

¹ Compare Art. 2 of Project No. X, submitted for the consideration of the Sixth International Conference of American States: "Asylum granted to persons accused of political crimes, in national territory, in legations, on war vessels, or in military camps or aircraft, must be respected. *Am. Jour. Int. Law*, Vol. XX (Special Supplement No. 1, p. 265.

PREFACE

also because its manner of approach most resembles the Anglo-American method. The decisions of the Philippine Supreme Court interpreting the amnesty proclamation of 1902 have also been included, although they do not involve extradition, for they shed some light on the nature of political offences.

One will look in vain for a comprehensive treatment of the subject in English. Most of the literature on the subject is published in foreign languages. The excellent paper read by Mr. J. Reuben Clark, Jr., before the American Society of International Law has been an invaluable guide in the discussion of the treaties negotiated by the United States with foreign powers. The author acknowledges his indebtedness to the masterly work of Grivaz entitled *L'extradition et les délits politiques* (a doctoral dissertation) and to Dr. Lammasch's valuable monograph, *Le droit d'extradition appliqué aux délits politiques*, not to mention the voluminous literature dealing with political offences. The author has been greatly aided by the two-volume work on extradition of Judge John Bassett Moore, which is a classic, as to the general principles of the law of extradition and the early cases decided by the Canadian and American Courts involving political offences, and by Dr. Langhard's *Das schweizerische Auslieferungsrecht nebst den Auslieferungsverträgen der Schweiz*, published in 1910, in the discussion of the cases decided by the Federal Tribunal of Switzerland up to that date.

The author wishes to express his gratefulness to the officials and the numerous assistants of the Library of Congress for their unfailing courtesy, and to the State Department for placing at the disposal of the writer documents bearing on the matter. To Professor Jesse S. Reeves, Head of the Department of Political Science of the University of Michigan, under whose direction this work was undertaken, he is under special obligation for encouragement and critical reading of the manuscript. Thanks are also due to Professor Edwin D. Dickinson of the Michigan Law School

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B. A.

Washington, D. C.

April 28, 1926.

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POLITICAL OFFENCES' IN EXTRADITION

INTRODUCTION

There is profound truth in the dictum of the great English legal historian, Sir Frederick Maitland, "that all history is but a seamless web; and he who endeavors to tell but a piece of it must feel that his first sentence tears the fabric."² In approaching the subject of political offences we have constantly kept in view the warning of the master. So inextricably is it interwoven with the development of extradition in general, indeed with the political history of the human race, that it is impossible to treat it as an isolated fact without the necessary historical background. It is, therefore, proposed to give in this chapter a general survey of the law of extradition as it has been developed through the centuries, laying particular stress upon the growth of the principle of non-extradition of political offenders. An American lawyer once remarked that this immunity of political offenders from extradition is one of the antics of history,³ for, as is shown later, history has completely reversed itself in this instance. The practices in antiquity, the middle ages, and during the early centuries of the modern era are antipodal to those of the present. An attempt is herein made to explain how this change has come about.

With the exception of a few recent monographs, most of the literature on the subject appeared in the second half

1 French writers use interchangeably *délits politiques*, *infractions politiques*, and *crimes politiques* for political offences. The word *délits* should be taken in a broader sense than the meaning ascribed to it in the French penal code in accordance with which it consists of such offences as are punishable with correctional penalties. Dalloz, *Code d'instruction criminelle et code pénal*, Art. 1. In the Spanish penal code, the term *delitos* embraces crimes and misdemeanors and is, therefore, of wider scope than the French equivalent. Guevara, *The Penal Code of the Philippine Islands*, Art. 1.

2 Cited by John Henry Wigmore in his introduction to von Bar's *History of Continental Criminal Law*, Legal Philosophy Series, vol. VI, ix.

3 Address of Frederic R. Coudert, *Proceedings*, Am. Soc. Int. Law, 1909, p. 127.

of the 19th century. Likewise the activities of jurists and learned societies in connection therewith took place during this period. As the 19th century drew to a close the enthusiasm died away, and it was not until after the Treaty of Versailles that there arose a revival of interest in the subject. Is this apparent lack of interest in a subject once vital in international relations due to the fact that the principle of non-extradition of political offenders has now become obsolete? Has the rapid advance of democracy during the last fifty years done away with the necessity of the rule? Or, is the so-called political offence going out of existence just as religious crimes went out of existence with the gradual disappearance of the peculiar conditions that called them forth? No doubt occasions are now less frequent for invoking the rule. The diminution of this class of cases towards the end of the 19th century may be attributed in great measure to the absence of revolutions. Civil wars are now less frequent for the people would rather air their grievances by constitutional means than resort to force. Even some of the Latin American countries which have been in chronic disorder since the founding of their independence are now becoming more peaceful. Bright as are the prospects for settling internal disputes through constitutional methods, Bernard's happy dream of a political millennium yet remains unfulfilled.¹ In some countries democracy is more nominal than real, while even in older democracies there are disquieting signs of latent discontent which might at any time burst into open defiance of the law. The readjustment of the political map of Europe as a consequence of the World War, much to the dissatisfaction of many, might in the future—if it has not already—become a fruitful source of civil commotions. So long as these sources of friction exist, just so long will political offenders claim the attention of the foreign offices of the various governments.

With the extension of international relations, nations have been aroused to a common feeling of solidarity of interest in the repression of common crimes. Along with the

¹ *Traité théorique et pratique de l'extradition*, (Paris, 1890) II, 253.

idea of self-protection came to be developed the principle of non-extradition of political offenders. It is the purpose of this study to trace the historical development of the principle, to seek the jural basis underlying it, and to offer, as far as we may be able, some suggestions looking towards the solution of the problem.

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CHAPTER I

HISTORICAL DEVELOPMENT

PERIODS INTO WHICH HISTORY OF EXTRADITION IS DIVIDED

Laire divides the history of extradition into three periods. The first period begins from antiquity and extends to 1833 when the Franco-Swiss treaty exempting political offenders from extradition became operative. It is characterized by severe repression of political offenders. The second begins from 1833 and extends to 1856 when a treaty was concluded between Belgium and France containing the so-called *attentat* clause. During this period political asylum reached its zenith. The third period covers the time from 1856 down to the present. This is characterized by attempts to limit the principle of non-extradition of political offenders.¹ The above-mentioned dates constitute important landmarks in the history of political offences. If we are to accept some such divisions for the sake of convenience, we may add a fourth period dating from the Treaty of Versailles. Although the Allied and Associated Powers failed to coerce Holland to extradite the former German kaiser, that treaty is important as concerns political offences because of the recognition therein of the principle that the authors of an unjust war are liable to punishment.²

EXTRADITION A MODERN INSTITUTION

There is a dispute among publicists on the question whether or not extradition existed in antiquity. Some

¹ *L'extradition et les délits politiques*, (Paris, 1911) pp. 39-40; Martens, *Traité de droit international*, (Paris, 1887) Sec. 92. The former Italian minister for foreign affairs, Signor Mancini, divides the history of extradition into three stages: the Empiric, the Conventional, and the Legislative. During the first period extradition was irregular and without any established procedure. That was true in antiquity and during the middle ages. During the conventional stage which lasted until the middle of the 18th century extradition became more regular. Finally, it was regulated by treaties and legislation. Carmichael, "The Italian Foreign Minister on Extradition," *Law Magazines*, (4th series) VII, 204-210; Walls y Merino, *La extradición y el procedimiento judicial internacional en España*, (Madrid, 1905) pp. 20-21.

² Treaty of Versailles, Art. 227, Martin, *The Treaties of Peace, 1919-1928*, I, 121.

writers maintain the affirmative view, while others are of the opinion that extradition is a modern institution.¹ According to Billot the word "extradition" was not employed in any of the conventions negotiated by France before 1828, and the decree of February 19, 1791, was the first official document in which it appeared. The word *restituer* or *remettre* was used in its stead. Even in the Treaty of Amiens of March 27, 1802, the word "extradition" was not employed.² If by extradition is meant a regular institution in aid of the administration of criminal justice, the so-called extradition in antiquity and the middle ages bears no resemblance to modern extradition because it lacks an essential character, the moral element.³

Grotius in his celebrated work, *De Jure Belli ac Pacis*, gives abundant examples of surrender of fugitive offenders in antiquity.⁴ But those examples cited by him from the Bible and the history of ancient Greece and Rome are of doubtful application. Some writers even go as far as to cite a treaty supposed to have been concluded between Ramses II and the King of the Hittites in the 14th century before the Christian era which provided for the mutual surrender of political offenders. The divergence of opinion among publicists as to the origin of extradition is, according to Saint-Aubin, due to the different ways of looking at the

1 Grotius, *De jure belli ac pacis*, (Trans. by Whewell, Cambridge, 1853) II, ch. 21, Secs. 4, 5; Faustin Hélie, *Traité de l'instruction criminelle*, Book II, 650; Bernard *op. cit.*, I, ch. 2; Hershey, *Essentials of International Law*, pp. 37-38; Phillipson, *The International Law, and Custom of Ancient Greece and Rome*, I, 358-374; Stieglitz, *Etude sur l'extradition*, (Paris, 1883) p. 1; Godoy, *Tratado de la extradicion*, (Guatemala, 1896) ch. 2; Calvo, *Le droit international*, (Paris, 1896) II, 476; Weiss, *Le droit féodal et les féodaux a Rome*, p. 22 et seq. Contra: Billot, *Traité de l'extradition*, (Paris, 1874) pp. 34-37; Grivaz, *L'extradition et les délits politiques*, (Paris, 1894) p. 44; Moore, *A Treatise on Extradition and Interstate Rendition*, (Boston, 1891) I, p. 8; Saint-Aubin, *L'extradition et le droit extraditionnel*, (Paris, 1913) I, 2; Teichmann, "Les délits politiques et les regicides", *R. D. I.* XI, 475; Valselhes, *Etude sur l'extradition*, (Paris, 1877) pp. 7, 18. This writer said that, although extradition as a system is a modern institution, its fundamental idea is imbedded in the remote past. See also Walls y Merino, *op. cit.*, pp. 13-16; Fiore, *Traité de droit pénal international et de l'extradition*, (Trans. by Antoine, Paris, 1880) I, 287, Rolin, "Les Infractions politiques", *R. D. I.* XV, (1883) 417.

2 Billot, *op. cit.*, p. 34. Art. XX of the Treaty of Amiens uses the term *livrer en justice*, Martens, *Recueil*, VII, 412.

3 Grivaz, *op. cit.*, p. 44.

4 II, ch. 21, Sec. 4.

thing. Some writers resort to history to find the exact date of the beginning of extradition while others treat it as an organic growth. Of these two methods, says the author, the latter is preferable because it is more scientific.¹

It is impossible to fix a definite date when extradition began. Like any other human institution, it is a product of gradual growth. The surrender of fugitives in early times was confined to political offences, such as the violation of ambassadorial privileges, the failure of the ambassadors themselves to observe their duty of neutrality, invasion of territory of states in the absence of regular war, violation of a treaty, and conspiracy to bring about war or rebellion.² Except the physical act of surrender there is nothing in common between the Roman *deditio* and the modern law of extradition. As Grivaz has pointed out, the surrender of an offender against ambassadorial privileges by the Romans cannot be justified on any legal principle, since the offender "is a Roman, delivered up by the Romans and who committed his crime in the territory of Rome". The surrender of the fugitive in all such cases was prompted by the belief that failure to do so was a just cause of war and not by any desire to repress crimes. Extradition presupposes a state of law and pacific relations between nations.³ The Roman practices, according to F. de Martens, were not even general, nor were there normal international relations. On the other hand the city-states of ancient Greece and Rome were hostile to one another and it was due to the common fear of reprisals that demand for surrender of fugitive criminals was seldom refused.⁴ Perhaps it would be more accurate to adopt the suggestion of Grivaz to use the term "remission" when speaking of ancient practices and to reserve the term "extradition" for modern practices.

THE RIGHT OF ASYLUM AMONG THE ANCIENTS

Without dwelling longer upon this controversy, which is purely academic, it may be stated that we can only discern in those early cases the crude beginnings of extradi-

1 Saint-Aubin, *op. cit.*, 1, 2.

2 Philipson, *op. cit.*, I, 367-374.

3 Laire, *op. cit.*, p. 41.

4 *Op. cit.*, III, 54-55.

tion. The Roman *deditio*, as already stated, was aimed at what we should consider today as political offences. In case of private crimes, the criminal was allowed to exile himself, it then being considered as sufficient punishment. The exaggerated notion of the ancients concerning the right of asylum and the right of banishment was an insuperable obstacle to the development of extradition. A place of worship and other sacred spots were regarded as sure places of asylum in which fugitives from justice were immune from punishment. It is remarkable how territorial asylum has survived down to the present age though not in its ancient form. In England religious asylum was not finally abolished until the reign of Henry VIII.¹ After the fall of the Western Roman Empire, when independent nations sprang out of its ruins, territorial asylum based on sovereignty was invoked by fugitives from justice. There were powerful reasons that could be given in support of the right of asylum aside from religious superstition. The barbarous criminal law in those early times made it absolutely necessary that there should be some kind of protection afforded criminals. In the language of Hallam, those sanctuaries of the middle ages served as "little green spots" in the tumult and rapine of the period. The right of asylum was then universally recognized. In the darkest days of the invasion of Rome by the barbarians from the north, it is recorded that Alaric issued orders not to molest those citizens who had taken refuge in the churches of St. Peter and St. Paul. The so-called right of asylum is the logical result of an archaic system of criminal law which is grounded upon the principle of private vengeance.² It was a moral and humane idea conceived to alleviate the cruelty and arbitrariness of the time when no regular criminal justice existed, and self-help was the only mode of securing justice; when penalties were conceived not as a means of punishing the criminals but rather as a political bludgeon with which the strong clubbed the weak into submission.³

1 Cox, *Sanctuary and Sanctuary Seekers*. (London, 1911) p. 329.

2 Moore, *Digest*, II, 756.

3 Martens, *op. cit.*, III, 59.

CONFUSION OF PUBLIC AND PRIVATE LAW

The social, political, and religious conditions of the time left their impress upon the development of public law. When Christianity became the state religion of the Holy Roman Empire heresy was a political offence.¹ During the feudal period the breaking off of the tie of allegiance that bound the vassal to his master was treated likewise.² The 17th century witnessed the relentless persecution of the French Protestants by Louis XIV after the revocation of the Edict of Nantes. Throughout this tumultuous period the right of asylum was the only salvation of the persecuted. In the early centuries it, therefore, was not strange to find common criminals, heretics, deserters, and emigrants jumbled together in the list of extraditable offenders. Some of these offences have already lost their importance. With the separation of Church and State and the growth of religious tolerance, religious crimes have disappeared. The people are now free to follow the dictates of their conscience without fear of being interfered with by the state. In the case of emigrants, with the recognition of the principle of expatriation, they ceased to be an object of persecution. Saint-Aubin attributes the change of attitude towards political offenders to the general progress of civilization and international intercourse which rendered necessary the creation of extradition as a juridical institution for common offences; and adds that the progress of liberal ideas, the disappearance of feudal conceptions which had for a long time confused public and private law, and the advance of democratic ideas are potent factors in the development of the principle of non-extradition of political offenders.³

In antiquity, the middle ages, and in the early centuries of the modern period, public law was hardly distinguishable from private law. It is a strange coincidence that the progress of public law has gone hand in hand with the development of democratic institutions. No better example can be cited illustrating this tendency than the history of the law

1 Munro, *The Middle Ages*, (New York, 1921) p. 16.

2 Grivaz, *op. cit.*, p. 70.

3 *Op. cit.*, I, 394.

of treason in England. At the time of Edward I those guilty of *laesa majestas* included "adulterers who ravish the king's wife, the king's lawful eldest daughter before she be married being in the king's custody; or the nurse, or the king's aunt, heir to the king". Lying against the king which included usurpation of offices was also considered treasonable.¹ In those days when highway robbery was a common occupation of the titled class, a robber ran the risk of being indicted for treason, for robbery was comprehended in the category of treasonable offences. Thus, we are told that John Gerbege was indicted for treason for taking away his enemy's horse and exorting from him ninety pounds as the price of his liberty. He was not convicted of the charge but was put to penance.² In the reign of Henry VIII a curious statute was passed which made it high treason "in any woman 'whom the king or his successors shall intend to take to wife thinking her a pure and clean maid, if she be not so' to marry the king without discovering it to him before marriage, and in any one knowing the fact not to reveal it to the king or one of his council."³ The statutes cited above show how the private affairs of the rulers were hopelessly mixed up with the affairs of state, for, to use the favorite expression of Louis XIV, "*L'état c'est moi*". Under such circumstances no clear and logical distinction could have been made between public and private offences.

THE INFLUENCE OF GROTIUS, LOCKE, AND ROUSSEAU

It was not until the law had been rationalized that the distinction between political and common offences was made possible. The first step in this direction was the effort of Grotius to divorce law from theology.⁴ Just as the

1 Horne's *The Mirrour of Justices*, chs. I, II. Maitland fixes the date of the publication of this work between 1235-1290. See Whitaker's edition, Introduction, p. XXIV.

2 Hale, *The History of the Pleas of the Crown*, I, 80.

3 Stephen, *History of the Criminal Law of England*, IV, ch. 23.

4 Dunning, *Political Theories from Luther to Montesquieu*, (New York, 1923) p. 166; Pound, "Theories of Law", *Yale Law Journal*, XXII, No. 2, p. 124. In a later work, however, Dean Pound has expressed the opinion that the prevailing belief that it was Grotius who was responsible for the emancipation of legal science from theology is not quite correct as the Dutch jurist merely restated the doctrine laid down by the Protestant jurist-theologians of the sixteenth century. "Grotius in the Science of Law", *Am. Jour. Int. Law*, October, 1925, p. 686.

Dutch jurist was successful in his task so were Locke and Rousseau in revolutionizing the prevailing conception of the state so that now we look not upon the rulers but upon the people as the source of authority.¹ If the people reserve the right to replace a government which has become tyrannical, it logically follows that the act of rebellion is devoid of the same depravity that characterizes a common offence. Thus, the foundation for the modern distinction between political and common offences was thereby laid. As a consequence of this winnowing out process, our public law has been purged of those extrinsic matters with which the state has no concern. There is no legislation today that would consider failure to abjure the Catholic faith as treasonable, and yet it was so considered at the time of Henry VIII. But notwithstanding the progress that has been accomplished in our legislation we still retain some ancient formulas. The old Roman *crimen majestatis* was revived by the legists after the decay of feudalism,² and is still found in the criminal codes of some countries.³ "It is enough", said Mon-

1 Dunning, *Political Theories from Luther to Montesquieu*, ch. X, *passim*; *ibid.*, *Political Theories from Rousseau to Spencer*, ch I, *passim*.

2 Grivaz, *op. cit.*, p. 70.

3 An interesting case came up before the Supreme Court of the Philippine Islands which involved the question whether or not the provision of the Penal Code of the Philippine Islands with reference to the crime of *lese-majesté* was still in force. The defendant was the editor of *La Nación*, a daily newspaper published in Manila. He published an article couched in abusive language, attacking the Philippine Senate for the loss of certain records of investigation conducted by said body in connection with certain oil corporations. The Senate adopted a resolution authorizing its president to indorse the case to the Attorney-General for such action as he might deem proper. A criminal complaint was then filed by the prosecuting attorney for the city of Manila in the municipal court thereof charging the defendant with violation of Art. 256 of the Penal Code which provides that "Any person, who, by word or deed or writing, shall defame, abuse, or insult any Minister of the Crown or other person in authority, while engaged in the performance of official duties, or by reason of such performance, provided that the offensive conduct does not take place in the presence of such minister or person, or the offensive writing be not addressed to him, shall suffer the penalty of *arresto mayor*." The defendant was convicted in the municipal court which decision was upheld by the court of first instance. Upon appeal, the Supreme Court reversed the decision of the lower court. Mr. Justice Malcolm, speaking for the court, said:

"It cannot admit of doubt that all those provisions of the Spanish Penal Code having to do with such subjects as treason, *lese-majesté*, religion and worship, rebellion, sedition and contempts of ministers of the crown, are no longer in force.

"According to our view, article 256 of the Spanish Penal Code was enacted by the Government of Spain to protect Spanish officials who were the representatives

tesquieu, "that the crime of *lese-majesté* be vague for the government to degenerate into despotism."¹

STATES NOT LEGALLY BOUND TO SURRENDER FUGITIVE OFFENDERS

The circumstances mentioned above have for a long while prevented the development of extradition as a juridical institution. However, Bodin, in the 16th century, realized its advantages. "If the magistrates", he said, "in the same republic are bound by a mutual obligation to aid each other and take a vigorous step looking towards the prosecution and punishment of the criminals, why are princes exempted from the obligation to which the law of God and of nature bind them?"² In the 17th century Grotius laid it down as a principle of international law that nations were bound to surrender a fugitive offender. Writers on public law since the time of Grotius are divided on the question whether or not in the absence of a treaty there is a legal obligation resting upon the asylum state to deliver up a fugitive offender. His views have been adopted by such writers as Heineccius, Burlamaqui, Vattel, Rutherford, Kent, Cornwall Lewis, Fiore, Faustin-Hélie, Rivier, and Clarke. The contrary doctrine is maintained by Mittermaier, Kluber, G. F. de Martens, Foelix, Ortolan, Wheaton, Renault, Heffter, Bluntschli, Billot, Phillimore, Bernard, Saint-Aubin and others who deny the existence of a legal obligation on the part of a state to surrender fugitive offenders independent of a treaty.³ It is not the purpose of this study to go into the details of that controversy. It is enough

of the king. With the change of sovereignty, a new government, and a new theory of government, was set up in the Philippines.

"Article 256 of the Penal Code is contrary to the genius and fundamental principles of the American character and system of government. The gulf which separates the article from the spirit which inspires all penal legislation of American origin, is as wide as that which separates a monarchy from a democratic republic like that of the United States.

"The crime of *lese-majesté* disappeared in the Philippines with the ratification of the Treaty of Paris. Ministers of the crown have no place under the American flag." (People v. Perfecto 43 P. R. 887, 897, 900, 901, 902).

1 *Esprit des lois*, t. I, liv. XII, 7, cited by Grivaz.

2 *De la republique*, Book III, ch. 6; Bernard, *op. cit.*, I, 228, II, 14 *et seq.*

3 The opinions of jurists are collected in Calvo, *op. cit.*, II, 454 *et seq.*

to state here that at least in British and American jurisdictions it is now settled law that no such obligation exists.¹ The most that can be urged in its favor is that the obligation is a moral not a legal one. The principle laid down by Grotius was too far in advance of his time. The hostility of nations towards each other was such that the progress of extradition was hindered at every turn. In practice most of the cases of surrender in his time were confined to political offenders. Similarly the treaties of this period were directed against those guilty of *lese-majesté*. Grotius himself was compelled to take refuge in a foreign country to escape the persecution of his own.²

THE INFLUENCE OF CRIMINALISTS OF THE EIGHTEENTH CENTURY

In the 18th century criminalists exerted a powerful influence upon the development of extradition. Beccaria, their chief exponent, emphasized the necessity of extradition as the only effective means of dealing with fugitives from justice. According to him there can be no more effective way of preventing crimes than to convince the criminal that no country is open to him where he may remain unpunished. But although Beccaria would do away with the right of asylum, he would not advocate its entire suppression on account of the harshness of the prevailing system of criminal law and the despotism of the rulers.³

EARLY PRACTICES CONCERNING POLITICAL OFFENDERS

As already stated, formerly political offenders were the object of special solicitude on the part of sovereigns. Thus, in 1174 Henry II, King of England, negotiated a treaty with the King of Scotland for the mutual surrender of traitors and criminals who might take refuge in either coun-

1 Moore, *Extradition*, I, p. 21 and authorities therein cited; Lawrence's Wheaton, *Elements of International Law*, (Boston, 1863) p. 233; Hyde, *International Law*, (Boston, 1921) I, 568; Lewis, *Foreign Jurisdiction*, pp. 38-39; Moore, *Digest*, IV, Sec. 581; U. S. v. Rauscher, 119 U. S. 407, 411-412; Terlinden v. Ames, (1902) 184 U. S. 270; Tucker v. Alexandroff (1902), 183 U. S. 424, 431.

2 Reeves, "The First Edition of Grotius' *De Jure Belli ac Pacis*, 1625", *Am. Jour. Int. Law*, XIX, 12, 16; Van Vollenhoven, "Grotius and the Study of Law", *ibid.*, p. 2. For a detailed account of his trial and escape from Holland, see Vreeland's *Hugo Grotius*, (New York, Oxford University Press, 1917) chs. V. VI.

3 *Des délits et des peines*, Sec. 21; Bernard, *op. cit.* I, 381 *et. seq.*; Grivaz, *op. p. 60 et seq.*

try. The treaty of Paris concluded in May, 1303, between England and France, provided that neither of the contracting parties should grant protection to the enemies of the other. In 1413 Charles IV, King of France, demanded from England the surrender of the principal rebels implicated in the troubles of Paris in these words: "*Illos nobis in urbem nostram Parisiensem sub tuta fide mittere custodia puniendos.*" Cola Rienzi was delivered up in 1315 to Pope Clement VI at Avignon by Emperor Charles IV. Mohamed II surrendered Bernardo Bandini de Baroncelli who was involved in the conspiracy of the Pazzi against the Medici. In 1497 Henry VII signed a treaty with the Flemings, called *Intercursus Magnus*, which prohibited the reception by either country of the rebels of the other. The king of Spain gave up the Earl of Suffolk to Henry VII upon the latter's promise that the life of the earl would be spared. In 1621 Friedrich von Tieffenbach, leader of the Moravian revolt, was delivered up by the Swiss Confederation and executed at Insbruck. The States-General delivered up Goertz to England on account of his participation in the conspiracy of Count Gyllenborg. England also obtained from the city of Leyden the surrender of Sir Thomas Armstrong who was implicated in the Rye House conspiracy. On February 23, 1661, England signed a treaty with Denmark by which the latter agreed to surrender all persons who had been responsible for the execution of Charles I. The States-General of Holland surrendered some of the regicides in the absence of a treaty. In 1662 a treaty was concluded, however, between England and Holland in which it was stipulated that the latter would deliver up such persons as were excepted from the English Act of Indemnity and all others wanted by the English government. France obtained from Spain the surrender of d'Oge who had taken part in an uprising in San Domingo.

The demands for surrender of political offenders were not, however, always accorded. Thus, the demand of Henry VII for the surrender of Perkin Warbeck was refused by the King of Scotland. The king of France refused to give up Morgan to Queen Elizabeth. Henry VIII failed to secure

from France the surrender of Cardinal Pole. Switzerland refused to deliver up Ludlow to England. In spite of the treaty of 1662, the States-General refused to deliver up to James II Burnet, private secretary to William of Orange, who was outlawed by a Scottish court, on the ground that he was a naturalized citizen of Holland. The demand of Austria for the surrender of Hendrick van der Noot who was implicated in the troubles of Brussels was likewise refused by Holland. Holland, however, had not always been consistent in her policy towards political offenders. Being under the influence of the Holy Alliance, she concluded a treaty in 1817 with Hanover for the surrender of political offenders. In 1820 she delivered up to France some of the officers of the first legion of the Seine. Even Russia refused to surrender Count von Hordt to the King of Sweden in 1756.¹

TREATIES AIMED AT POLITICAL OFFENDERS

The treaties concluded among the powers, some of which have already been mentioned, which provided for the extradition of political offenders are: England and Scotland of 1174 and 1308; France and England of 1303; France and Savoy of 1378; England and Flanders of 1641; England and Denmark of 1661. The treaties of the 18th century and those at the beginning of the 19th which contain similar stipulations are: France and Switzerland of 1777, 1798, 1803, and 1828; Denmark and Sweden of 1823; Spain and Portugal of 1823; Austria and Switzerland of 1828; Austria and Tuscany of 1829; Prussia, Austria, and Russia of 1834; Austria and Sardinia of 1838.² Article 9, paragraph 2, of the Acts of the Congress of Vienna, prohibits the Republic of Cracow "from giving any asylum to fugitives, deserters or persons prosecuted by the law belonging to any of the said Powers (Russia, Austria and Prussia)."³

1 A collection of early cases and treaties of extradition is found in Clarke, *A Treatise Upon the Law of Extradition*, ch. 2; Grivaz, *op. cit.*, pp. 53-55, see footnotes; Lammasch, *Droit d'extradition appliques aux délits politiques*, (Trans. by A. Weiss and P. Lucas, Paris, 1885) pp. 22-23; Teichmann, "Les délits politiques, le regicide et l'extradition", *R. D. I.* XI, (1879) 476-481; Moore, *Extradition*, I, 303-305.

2 Fauchille, *Traité de droit international public*, (Paris, 1922) I, 1014-1015.

3 Weiss-Lammasch, *op. cit.*, p. 24.

PRINCIPLE OF NON-SURRENDER OF POLITICAL OFFENDERS OF RECENT ORIGIN.

Just as there is a disagreement among writers on the question whether or not extradition existed in antiquity, so a similar question has been raised with reference to political offences. It seems that much of the misunderstanding is due to the failure to look at it from the right angle. Like extradition in general, the principle of non-extradition for political offences is also of recent origin, although in the past political offenders were frequently delivered up. It was France who led the movement to exempt this class of offences from extradition. The principle of non-extradition for political offences was unknown prior to the French Revolution. Grotius, after having discussed the duty of states to surrender fugitive criminals, adds that the right to demand the extradition of a fugitive offender is, according to the prevailing practices, confined only to political offences and crimes of peculiar atrocity. "But this right of demanding," said he, "for the sake of punishing, those who have fled out of the territory, is, in this and the last preceding ages, in most parts of Europe, used only with regard to those crimes which affect the public good, or have some peculiar features of atrocity."¹

Thus, political offences and common crimes are put under the same category. Grotius was right with reference to political offences as most of the demands for surrender at that time were for political reasons.

¹ *Op. cit.*, II, ch 21, Sec. 5; Grivaz, *op. cit.*, p. 54; Lawrence, *Commentaire*, (Leipzig, 1880) IV, 374. Grotius is not very clear as to what is meant by the passage, "*crimina... quae statum publicum tangunt*", which has been interpreted by some writers as political offences. Whewell translated it as "crimes which affect the public good." This is not quite synonymous with political offences as the latter term is understood in international law. As a matter of fact, if we accept the literal translation independent of the whole thought of Grotius most crimes would be political because they affect public good. The translation of Pradier-Fodéré is similar to that of Whewell: "*crimes qui touchent les affaires public.*" (*Le droit de la guerre et la paix*, II, Sec. 5504). This ambiguity is, however, removed by reference to a previous passage from Grotius in which he speaks of the right of the state or its ruler to exact punishment for offences by which such state or its ruler are especially assailed. *Ibid.*, II, ch. 21, Sec. 3; Quincy Wright, "The Legal Liability of the Kaiser", *The American Political Science Review*, XIII (1919), 123. This passage taken together with the prevailing practice as regards political offenders leaves no room for doubt as to the meaning that the author wanted to convey.

THE FRENCH REVOLUTION AND POLITICAL ASYLUM

The first attempt to distinguish between political and common offences was made by Buzot during the debate in the Assembly in France on the report of the committee on foreign relations concerning the demand of Austria for the extradition of three employees of the bank of Vienna charged with counterfeiting. He said: "It appears to me indispensable that the man who flees a country where he has committed a crime may not find in any other country an asylum which assures him impunity; but that we give also a means of preventing ministerial injustice, of preventing the inquisition which could be exercised upon every person who seeks a free and hospitable land in order to escape from despotism. So delicate a question ought not to be judged by the circumstances. If, for example, this counter-revolution of which we speak so happens, who is he among us who would not flee this land today however dear and however odious now? Well, according to the theory of the reporter, we shall also be claimed as fugitive criminals, and declared guilty for not having wanted to cease to be free. It is but a question of a pact to be made between nations in favor of liberty or despotism."¹ This idea of Buzot, uttered in a tense situation, did not bear immediate fruit, for, according to Bernard, seven years had to elapse before there could be any official document on extradition.² The best evidence that the new principle announced by Buzot was not then generally accepted even in his own country was the treaty of alliance concluded between France and Switzerland on August 19, 1798, which superseded the treaty of 1777. It provided in Art. 14 that "the two republics enter into a mutual agreement not to grant asylum to the emigrants or to the deported from each country. They likewise bind themselves to extradite reciprocally at the first requisition the nationals of each country who shall be declared by the court guilty of conspiracy against the internal and external security of the state, assassination, poisoning,

¹ *Moniteur*, VII, 559; Bernard, *op. cit.*, I, 409; Grivaz, *op. cit.*, pp. 74-75.

² *Op. cit.*, I, 410.

arson, falsification of public documents, and robbery with violence, or who shall be prosecuted as such by virtue of an indictment.”¹ In this treaty no distinction is made between political and common offences; both are extraditable.

According to Taine, the historian, the French Revolution had shown itself disloyal to the principle by denying the right of emigration and renewing the same rigors against the fugitives that Louis XIV had employed against the Protestants after the revocation of the Edict of Nantes.² The violence of the Revolution rendered it necessary that the right of asylum for political refugees be maintained. In this respect it is analogous to the Reformation. The revolutionary measures which proceeded from the same autocratic spirit as the decrees and the dragoonades of despotic rulers had one identical effect: the need of maintaining political asylum and of distinguishing between political and common offences. The only difference between the two is that the Revolution came later than the Reformation and the absolute monarchs were more loyal to their principles.³

THE CASE OF NAPPER TANDY

At the beginning of the 19th century extradition had not yet crystallized into a regular institution, and the principle of non-extradition for political offences was observed or violated according as it suited the interest of the sovereigns. Public opinion was, however, gradually forming in favor of immunity of political offenders from extradition. The famous cases of Napper Tandy and the abduction of the Duke d'Enghien by Napoleon from a foreign territory did more than anything else to bolster up the cause of political offenders.

Napper Tandy and his companions were Irish rebels, who, after an unsuccessful attempt to overthrow British power in Ireland, were forced to take refuge in the city of Hamburg. Immediately after their arrival there, the British minister in the city, Sir James Craufurd, demanded their surrender. The city magistrates had them arrested

1 Martens, *Recueil*, VII, 279; *Calvo*, op. cit., II, 473; Billot, op. cit., p. 41.

2 *The French Revolution*, (trans. by John Durand, New York, 1878) I. 159-161.

3 Grivaz, op. cit., p. 77.

in spite of their protest that they were French citizens. The French minister at once filed a protest demanding the release of Napper Tandy and Blackwell on the ground that they were French subjects, both of them holding commissions in the French army. Embarrassed by pressure from both sides, the senate referred the matter to the King of Prussia and the Duke of Brunswick as Directors of the Circle of Lower Saxony, but they declined to interfere. Finally the prisoners were sent to Ireland to be tried for high treason. Napper Tandy was convicted of high treason and sentenced to death. The sentence was, however, not executed, and after the Treaty of Amiens he was released. Blackwell and Morris were likewise released and joined the French army. Corbet escaped from prison. When the directory learned of their surrender, it severed all diplomatic relations with the city of Hamburg and placed an embargo on all vessels in French ports carrying the flag of the said city. The senate in a letter addressed to the consulate explained the reason for taking such action. In reply thereto, Napoleon rebuked the senate for having "violated the laws of hospitality in such a manner as would put to shame the wandering tribes of the desert," and added: "The two unfortunate men whom you have given up will die illustrious; but their blood will do more harm to their persecutors than could have been done by an army."¹

Commenting on this incident, Rolin declared: "This haughty language of Napoleon was but an empty phraseology and seems the more strange when, a few years later, he who held to that doctrine did show to the world how he understood the right of asylum by causing the arrest of the Duke d'Enghien in a foreign country who was shot after a mock trial at the dungeon at Vincennes."² This rash action of Napoleon had a far-reaching effect upon European politics. So great was the indignation aroused among the powers by the violation of the territory of the Grand Duchy of Baden that Frederic William broke off negotiations on

¹ A full account of the incident is given in Gibbs, *Extradition Treaties*, (London, 1868) pp. 13-24; Martens, *Causes Célèbres*, IV, 106-126.

² Rolin, *op. cit.*, p. 424; Sullivan, *Famous Assassinations of History*, p. 37.

the alliance which he was on the point of concluding with France, and the Emperor of Russia denounced to the German Diet Napoleon's violation of a neutral territory. The upshot was that the First Consul's declaration to the senate of Hamburg remained without influence upon European public law.¹

REACTION IN GREAT BRITAIN

The condemnation by the civilized world of such high-handed methods employed by the two great powers manifested the growing sentiment in favor of the principle of non-extradition of political offenders. In 1815, in a speech in the House of Commons, Sir James Mackintosh vigorously criticized the action of the governor of Gibraltar and the British consul at Cadiz in delivering up certain Spanish subjects who had taken refuge in said fortress.² He said that the right of political asylum was a "part of the consuetudinary law of nations" and a "venerable" principle, which was a rather bold assertion; for, as has already been shown, most of the cases of surrender prior to that time were for political reasons. The inaccuracy of the observation of the learned speaker becomes the more apparent when the coercion of the city of Hamburg by England in connection with the surrender of Napper Tandy and other Irish patriots and the abduction of the hapless Bourbon prince, the Duke d'Enghien, by Napoleon were still fresh in memory. But, barring this insignificant historical inaccuracy, the speech made a profound impression upon the civilized world and awakened in the conscience of mankind a feeling of sympathy for political refugees. Like a barometer, it foretold with singular exactness the coming change in the public opinion in England and other liberal powers with reference to political offenders.

Replying to the remonstrances of Mr. Zea de Bermudez in connection with the charge that Great Britain was harboring Spanish refugees, Canning said that governments were not bound, in the absence of a treaty, to surrender po-

¹ Grivaz, *op. cit.*, p. 80.

² *Hansard's Debates*, XXIX, p. 1126.

litical offenders. Great Britain had no such treaty with Spain. Neither would she enter into such an agreement with that government or any other power. The British consul at Tangier could not arrogate to himself a power which the government of Great Britain could not have exercised in Great Britain.¹ Acting upon this policy, England refused to deliver up to Russia a political refugee who was implicated in the troubles in St. Petersburg. In 1828 and 1829 the Low Countries refused to surrender to Spain the Spanish revolutionists who had taken refuge there. Even Russia refused to give up a Jew by the name of Jus-sup to Turkey in 1826. The reactionary policy of the Holy Alliance coupled with the extreme severity with which the restored monarchs of Europe treated their political enemies made the liberal powers see the obvious necessity for such a rule.

OPINIONS OF CONTINENTAL PUBLICISTS

Among the continental publicists, DeBonald in a work published in 1802, had pronounced himself in favor of the principle. Thus he said: "Extradition should not be accorded for local and political offences, and if the right of asylum is not attached to temples, the whole universe is a temple for the unfortunate man." His opinion was, however, not shared by two eminent French criminalists, Carnot and Lagraverend, who, writing in 1812 and 1816, respectively, ranged themselves in opposition thereto.² In Germany the principle of political asylum was proclaimed for the first time by Tittmann in a work published in 1817. He observed that "extradition ought not to be readily applied to imprudent manifestations, for example, to attacks directed against the constitutional system or against the political institutions of a state." In 1822 Schmalz wrote: "If a zeal badly understood for the rigorous observation of

¹ Stapleton, *Political Life of Canning*, III, 140.

² Weiss-Lammassch, *op. cit.*, p. 26; De Bonald, *Législation primitive*, II, ch. 17, Sec. 6: "L'extradition ne doit pas être accordée pour des délits locaux et politiques, et si le droit d'asile n'est pas attaché aux temples, l'univers entier est un temple pour l'homme infortuné." Carnot, *De l'instruction criminelle*, I, 53; "Lorsqu'il s'agit d'un crime d'Etat, l'extradition ne se refuse jamais, si les Puissances ne sont pas en guerre." Lagraverend, *Traité de la législation criminelle en France*, I, 85; Grivaz, *op. cit.*, 81-82.

the principles of justice should establish the absolute obligation of surrendering one who should be accused of having compromised public safety, will it not be easy for despotism to profit by this means in order to drag away from their asylum men unjustly prosecuted and thus deprive oppressed innocence of its last and sad resort, the flight?"¹ Provo Kluit, a countryman of Grotius, was the first writer to expound the doctrine with juristic arguments in a work entitled *De deditione profugorum*, published in 1829, at the time when the Holy Alliance was at the apex of its power. The Dutch jurist, however, committed an error by asserting that the doctrine was universally recognized then, when, as a matter of fact, not only were publicists disagreed on the question, but also it was not universally applied in practice. Because of his influence upon subsequent writers, it may be useful to examine his work somewhat in detail.

According to him, there would seem at first blush to be no reason for refusing to surrender political offenders as they inflict greater damage on the State than ordinary criminals. Considering, however, the many abuses of the despotic rulers at the time, humanity and justice demanded that political refugees ought not to be surrendered. He believed that a duty is incumbent upon the asylum state as a disinterested power not to give up political refugees. All such men should rather be considered as personal enemies of the tyrant and to surrender them under the circumstances would be equivalent to supporting the injustice of the tyrant. Even if political refugees should disturb the peace of the asylum state by their political activities, they should simply be expelled and not extradited. He did not approve of the extradition of the British regicide judges to England by Denmark, and the only motive he could discover was the desire on the part of the King of Denmark to curry favor with the English. As strong a partisan as he was in favor of political asylum, he was equally bitter in denouncing

1 Tittmann, *Handbuch der Strafrechtswissenschaft und der deutschen Strafgesetzkunde* (1882, 2nd ed.) 1st Part, Sec. 32; Schmalz, *Das Europäische Völkerrecht*, (Berlin, 1822) Book IV, ch. III, 160; *Le droit des gens européen*, (Trans. by Count Leopold de Bohm) Paris, 1823, pp. 160-61; Calvo, *op. cit.*, II, 676; Weiss-Lammasch, *op. cit.*, p. 26; Grivaz, *op. cit.*, p. 81.

murderers, who, under the cloak of politics, seek protection in a foreign country. He clearly foresaw the abuses which were likely to follow from an unrestricted extension of political asylum. He said: "But under this head many perplexing questions might come up. What is to be done in case of regicides like Baltazar Gerads, Ravailiac, or Louvel who assassinated the Duke of Berri? Should such ruthless fanatics and dangerous enemies of the State be granted the privilege of asylum? Is such treatment in order, when we have to do with a treacherous assassin who in times of profound peace has destroyed a sovereign beloved by the nation?" The author would seem to think that reactionary political offenders may not invoke asylum. "Are persons", he asked, "to be admitted to asylum or extradited whose motive for entering a conspiracy was only their love of subversion and who rebelled against a righteous sovereign without just cause?" He justified the extradition by Holland in 1820 of some French officers charged with conspiracy on the ground that they had a fair trial from which it may be inferred that a political refugee may be surrendered if there is an assurance of a fair trial by the demanding state. He realized the impossibility of drawing a sharp line distinguishing political from common offences in some cases. He said: "Considering the extreme difficulty of arriving at a correct valuation of the facts, and under the impression that charges of political crime serve often as a cloak to cover all kinds of abuses, it will be the safest practice to refuse such extradition as a matter of principle. This norm is to be applied except in cases where it is plain that aside from the political purpose the incriminated act constitutes a grave crime for which extradition is always granted."

THE GALOTTI AFFAIR

In France the recognition of the principle of non-extradition of political offenders was hastened by the Galotti affair. Galotti was a Neapolitan officer who belonged to the faction of the Carbonari. He took part in the revolution of 1820. Sentenced to death *par contumace* after the

restoration of the Bourbons, he fled to Corsica. The Neapolitan minister in Paris demanded his extradition on a charge of theft and violence against persons and made a formal promise to the French government that he would not be tried for a political offence. The extradition was granted on that assurance; but it was withdrawn by the French government even before the arrival of Galotti at Naples upon being informed that, notwithstanding the minister's promise, the charges were in reality political. This counter order arrived too late; Galotti was already in the hands of the Neapolitan government, which refused to release him. The event had such a repercussion in French politics that, following an interpellation in the chamber, the Martignac cabinet insisted in its demand and sent a squadron to the Neapolitan waters to enforce it if necessary. In view of the determined attitude of France the government of Naples only imposed on Galotti the penalty of deportation for ten years. Satisfied with the result, France let the matter drop. Finally Louis Philippe obtained Galotti's liberty.¹

EXTRADITION AN ESTABLISHED INSTITUTION IN LATTER HALF OF NINETEETH CENTURY

The practice of extradition did not become general until the latter half of the 19th century. According to Judge Moore, the treaty of 1174 concluded between Henry II and William the Lion, King of Scotland, never was in force so that the real beginning of extradition treaties between England and the continental European states dates from the Treaty of Amiens.² In 1842 England signed an extradition agreement with the United States, and with France in the following year. Because of lack of an act of Parliament to carry out its provisions the treaty with France failed. The treaty with the United States became operative in England about a year after it went into effect in the United States for the same reason.³ So unpopular was the extradition clause of the treaty of 1842 in the United States that

1 Weiss-Lammasch, *op. cit.*, pp. 26-27.

2 Moore, *Extradition*, I, p. 10.

3 Clarke, *op. cit.*, p. 128.

Senator Benton introduced a resolution in the Senate that would put an end to it. The resolution failed to pass.¹ In order to meet certain objections to the previous treaty, a convention was concluded between England and France in 1852. This, too, failed on account of the attitude of the House of Lords. Between 1854 and 1856, France made seven demands on England which were all refused.² Although Great Britain did not have a regular system of extradition treaties with other countries until after the passage of the Extradition Act of 1870, she has long upheld the principle of non-extradition of political offenders. The treaty of 1843 with France contained no express stipulation excepting political offenders from extradition. This defect was remedied in the convention of 1852 by the insertion of a clause to that effect. It was provided in the said convention that "no accused or convicted person who may be surrendered shall, in any case, be proceeded against or punished on account of any political offence committed prior to his being surrendered, nor for any crime or offence not described in the present Convention, which he may have committed previously to his being surrendered; and proof of having been so surrendered under this Convention shall be a good and valid defence against any proceeding on account of any political offence previously committed, and shall entitle the party to an immediate acquittal."³

As regards the United States, her first extradition agreement is contained in Art. 27 of the Jay Treaty. This clause as well as Art. 10 of the treaty of 1842, otherwise known as the Webster-Ashburton Treaty, contained no express stipulations in favor of political offenders, the reason being that the public sentiment both in the United States and Great Britain as well as the specific enumeration of extradition crimes in the treaty made the insertion of such a provision unnecessary.⁴ The government of the United

¹ *Sen. Docs.*, 28th Cong., 1st Sess., vol. III, p. 125, 1843-44; Moore, *Extradition*, I, p. 12.

² Clarke, *op. cit.*, p. 139; Lewis *op. cit.*, p. 40.

³ Hertslet, *Treaties*, IX, 281, Art. 7; Clarke; *op. cit.*, p. 137.

⁴ President Tyler said in his message of August 11, 1842, to the Senate relating to the Webster-Ashburton treaty: "In this careful and specific enumeration of crimes,

States itself being founded on revolution would not deny the right of asylum to such political refugees as had escaped the persecution of their own country. Under the Jay Treaty only one demand was made by Great Britain on the United States. That was the extradition of Jonathan Robbins. It was so unpopular that, it is said, it even influenced the result of the presidential election of 1801.¹ According to William Beach Lawrence, the extradition clause of the Jay Treaty was not self-executing, and that in the absence of an act of Congress the president was without legal authority to order the surrender of an individual to a foreign state.² The same was said of the extradition clause of the Webster-Ashburton Treaty.³ At first there seemed to be some doubt on the question, and in order to remove this doubt Congress passed an act on August 12, 1848. The question, according to Judge Moore, had never been decided by the court.

On account of the distrust that nations formerly entertained towards each other, most of the early extradition treaties failed. In England the extradition of common criminals was not regularized until after the enactment of the

the object has been to exclude all political offences, or criminal charges, arising from wars or intestine commotions. Treason, misprision of treason, libels, desertion from military service, and other offences of similar character, are excluded." *Ex. Docs.*, 27th Cong. 3d Sess., vol. I, *Doc. 2*, p. 22; Webster's Works, p. 347. William Beach Lawrence was of same opinion. *Alb. L. J.* XIV, 85. "Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for political offences, or to the protection of asylum for political or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." Mr. Fish, Sec. of State, to Col. Hoffman, May 22, 1876; *For. Rel.* 1876, 233, 237; Moore, *Digest*, IV, 334. In the Koszta case Secretary Marcy said: "To surrender political offenders. . . is not a duty; but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind." Mr. Marcy, Secretary of State, to Mr. Hulsemann, Sept. 26, 1853. *Sen. Docs.*, 33d Cong. 1st Sess., vol. I, 34; Moore, *Digest*, III, 827; *Extradition*, I, 214, 305-306.

1 Clarke *op. cit.*, p. 41. See speech of John Marshall delivered in the House of Representatives on the resolutions of the Hon. Edward Livingston, relative to Thomas Nash, alias Jonathan Robbins. Philadelphia, printed at the office of *The True American*, 1800.

2 *Alb. L. J.* XIV, 88.

3 Spear, *The Law of Extradition*, pp. 101-102.

Extradition Act of 1870. In the circular on the subject of extradition issued on April 5, 1841, the French minister of justice mentioned the treaties which France had negotiated with Spain, Switzerland, Belgium, and Sardinia, and the fact that France could obtain the extradition of criminals from other countries even in the absence of treaties except from Great Britain and the United States. The unique situation in England was due to the lack of power in the executive to surrender a criminal in the absence of an act of Parliament.¹ In the United States the rule is that in default of a treaty or an act of Congress the Federal Government is without authority to arrest a fugitive offender and deliver him up to a foreign power.² This was precisely the situation as between England and the United States during the period from the expiration of the Jay Treaty to the conclusion of the Webster-Ashburton Treaty.

POLITICAL ASYLUM IN THE UNITED STATES

The earliest treaty of the United States which contained specific provision exempting political offenders from extradition was that with France in 1843.³ All subsequent treaties contained similar provision. Perhaps the first pronouncement in the United States on the subject of political offences is that made by Thomas Jefferson in the instruction given to Carmichael and Short, United States commissioners, charged with negotiating a convention with Spain, in which that famous statesman distinguished between "acts against the government" and "acts against the oppression of the government" and called the latter virtues.⁴ The right of political asylum did not attract much attention in the United States before the Civil War, for, during that time only one case, that of Mackenzie, occurred. In his *Commentaries on American Law*, Kent made no mention

1 Lewis, *op. cit.*, pp. 38-39.

2 See note 1, p. 12.

3 Malloy, *Treaties*, I, 526.

4 Mr. Jefferson, Sec. of State, to Messrs. Carmichael and Short, March 22, 1792, *Am. State Pap., For Rel.* I, 258; *Moore, Digest*, IV, Sec. 604.

of political offences,¹ and this is the more strange when the learned commentator had cited the statute of New York of April 5, 1822 in accordance with which Governor Marcy refused to deliver up Mackenzie to Governor Head of Upper Canada on the ground that the charges against him were connected with an act of a political character.² Story was likewise silent on the point.³ The rule that political offenders are excepted from the operation of extradition treaties found itself for the first time in America in Wheaton's *Elements of International Law*, the first edition of which was published in London in 1836, five years before the publication of the last edition of Story's *Conflict of Laws*, by its author and eight years previous to the appearance of Kent's last edition of his legal classic.⁴ That Wheaton anticipated his contemporaries might be due to his contact with European politics and familiarity with contemporary European writers on public law. But his positive assertion that the principle of non-extradition of political offenders was a part of the law of nations should be qualified by the fact that, although the liberal powers of Europe, like England, France, Belgium, Holland, and Switzerland, had already recognized it, Russia, Prussia and Austria did not countenance it.

THE CASE OF WILLIAM LYON MACKENZIE

The first case decided in the United States involving the surrender of a political offender was that of William Lyon Mackenzie. The case turned upon the interpretation of the statute of New York of April 5, 1822, which provided for the extradition of fugitives from the justice of a foreign power, accused of certain crimes except treason. The facts are briefly these: Mackenzie and his followers started an insurrection in Upper Canada on December 4, 1837. They were ordered to disband by Governor Head but they refused. They made it known to the governor that they would only lay down their arms if he would sum-

1 *Kent's Commentaries*, I, 41-42.

2 See note 1, p. 28.

3 Story, *Conflict of Laws*, Secs. 626-628.

4 Lawrence's Wheaton, *op. cit.*, p. 236. See "Notice of the author" by W. B. Lawrence.

mon immediately a popular convention to introduce changes in the existing form of government and pardon those who had taken part in the revolt. In the course of the hostilities, they shot to death one Moddie, burned the house of a Mr. Horne, and robbed the mail. The governor dispatched a force to put down the rebellion. After an encounter between the government and insurgent forces in which the latter were defeated, Mackenzie fled to New York. Thereupon Governor Head demanded his extradition on charges of murder, arson, and robbery. Governor Marcy declined to grant the request on the ground that the crimes with which Mackenzie was charged were only incidental to the rebellion, and that the purpose in asking for his extradition was to try him for treason in which event, under the New York statute, he was not empowered to act otherwise. Attorney-General Beardsley, to whom the case was referred by the governor for an opinion, held that the exemption of political offenders from extradition was the "true principle of public law."¹

THE KOSSUTH EPISODE

Born of revolution, the United States has not been a disinterested spectator to popular movements in Europe. Despite its traditional policy of non-intervention in European affairs, it has, on various occasions, manifested its sympathy for the oppressed nationalities of Europe in their struggle for freedom. It was through the advocacy of the late President Wilson that the principle of self-determination was given application in the treaty of peace of 1919. According to an authority, the United States had, in fact, meddled in European internal affairs "through the power of recognition, the extension of moral support, and the offering of asylum to political revolutionists."² At times its conduct brought forth remonstrances on the part of European powers as in the Kossuth episode. This incident was the outcome of the Hungarian revolution of 1848. President Taylor sent a confidential agent to Hungary with instructions to recognize the revolutionary government should he

¹ MSS. Misc. Let.; Moore, *Extradition*, I, pp. 314-315, see footnotes.

² Garner, *American Foreign Policies*, p. 56.

find it sufficiently stable. But before the agent's arrival in Hungary, the revolution was virtually ended on account of the intervention of Russia. The rebels in the meantime had taken refuge in Turkey. President Taylor explained his purpose in dispatching a confidential agent in these words: "I thought it my duty, in accordance with the general sentiment of the American people, to stand prepared, upon the contingency of the establishment by her of a permanent government, to be the first one to welcome Hungary into the family of nations."

The publication of the President's instructions gave rise to a protest on the part of the Austrian government through its *chargé* in Washington in which it accused the United States of unduly interfering in the internal affairs of Austria. In his reply which was couched in no less vigorous terms, Webster adverted to the fact that no foreign state could take away from the United States the right to express its opinion on the great political events transpiring "among the civilized nations of the earth". The feeling between the two governments was intensified by the arrival of Kossuth in the United States, who was brought over on an American war vessel in pursuance of a resolution of the Senate. The Hungarian hero was introduced to the President by the Secretary of State and was received by both houses of Congress. A congressional dinner was tendered in his honor. Wherever he went he was received with unprecedented popular enthusiasm. The *chargé* then renewed his protest, even going to the extent of appealing directly to the President. The controversy led finally to his recall. Kossuth came to the United States with the object of seeking its material aid in his country's struggle for freedom. His proposition found a cold reception in Washington.

The judgment of history is that the action of the American government in this case involved more than a mere expression of opinion.¹ It constituted an unwarranted interference in the internal affairs of Austria and, therefore, a departure from the time-honored policy marked out by

1 Garner, *American Foreign Policies*, p. 57.

Washington and Jefferson and Monroe!

THE FRENCH CONSTITUTION OF 1830

The July monarchy had shown marked liberality towards political offenders, Louis Philippe himself having been a political refugee in both hemispheres. The French constitution of 1830 was the first official document in which the principle of non-extradition of political offenders was expressly recognized. From this document the principle passed into the Belgian constitution of 1831 and then into Art. 46 of the Organic Laws of the German People (*Grundrechte des deutschen Volkes*).² Dr. Lammasch has pointed out that it was France's good fortune to cause these ideas to descend from the realm of theory into that of practice.³ On June 5, 1832, France proposed to Switzerland to put into effect the treaty of July 18, 1828, beginning September 29, 1833, subject to the condition that crimes against the safety of the state would be exempt from extradition.⁴

Since then the treaties negotiated by France and Switzerland have always contained express stipulations excepting political offenders from extradition. The original type of exemption clause usually found in early extradition treaties, though sufficient to protect a fugitive accused of purely political crimes, was considered to be inadequate in case of relative political offences. To remedy this apparent defect, the Belgian law of October 1, 1833, was passed. Art. 6 of said law was embodied in the Franco-Belgian treaty of 1834 which provided "that the fugitive whose extradition shall have been granted, shall not be prosecuted or punished for any political offence anterior to the extradition, or for any act connected with such offence; nor for any crime, or

1 Foster, *A Century of American Diplomacy*, p. 332.

2 Rolin, *op. cit.*, p. 417.

3 *Op. cit.*, p. 26.

4 The clause of the Franco-Swiss treaty of July 18, 1828, which provided for the surrender by either party of persons accused of having committed crimes against the safety of the state had never been in operation. It was repealed by an exchange of notes between the French ambassador in Switzerland and the Swiss government. See Billot, *op. cit.*, pp. 109-110.

offence not provided for by the present convention".¹ This provision has been copied in practically all modern extradition treaties. It was also incorporated in the English Extradition Act of 1870, in the extradition bill presented by M. Dufaure to the French senate in May, 1878, and in the proposed Italian penal code.²

THE CIRCULAR OF 1841

The circular of 1841 of the minister of justice of France referred to above provided *inter alia* for non-extradition of political offenders. It likewise provided that when a Frenchman delivered up by a foreign power was at the same time accused of a political offence, he could only be tried for a common offence. Immediately after the judgment, in case of acquittal, or after the expiration of the penalty if he was convicted, he was allowed a certain period of time within which he should leave the country, and if after the expiration of that period he was still found in the *locus delicti* then he could be prosecuted for a political offence. The rule of giving a fugitive offender opportunity of returning to the asylum state before he can be prosecuted for another offence has been adopted in other jurisdictions.³ The circular states the ground for exempting political offenders from extradition. "Political crimes," says the circular, "are committed under circumstances of which it is so difficult to take account; they spring from passions so inflamed, which often form their excuse, that France maintains the principle that extradition ought not to take place for a political act. This is a rule which she considers it a point of honor to uphold. She has always refused since 1830 such extradition. She will never ask it."⁴

THE REVOLUTION OF 1848—PALMERSTON'S EPOCH— MAKING UTTERANCE

In 1834 Russia, Austria, and Prussia signed a treaty

¹ Martens, *Recueil*, XX, 732.

² Weiss-Lammasch, *op. cit.*, pp. 30-31.

³ U. S. v. Rauscher, *supra*; Moore, *Digest*, IV, Secs. 596-597; *ibid.*, *Extradition* I, 194-244.

⁴ The full text of the circular is printed in Billot, *op. cit.*, pp. 415-423; see also Gibbs, *op. cit.*, p. 26; Dalloz, *Jurisp. gén.*, 1841, III, 440; Clarke, *op. cit.*, p. 211.

in which it was agreed that one of the signatory powers should shelter or grant asylum to any "person guilty of high treason or armed insurrection, or entering into any association directed against the safety of the throne or the government in any one of the three countries."¹ This treaty was the outcome of the policy of the Holy Alliance to suppress by force the revolutionary movement which they considered detrimental to the old order.

It was not until after the revolutions of 1848 that the principle of non-extradition of political offenders became definitely a part of the public law of Europe.² "At this epoch," wrote Holtzendorff, "even in eastern Europe, the doctrine of political asylum was sufficiently assured, when the events of 1848 exploded and the revolutionary wave spread to the frontiers of Russia and the mouth of the Danube. In February and March princes and ministers fled; in the summer or autumn of the same year it was the insurgents who left Baden, Prague, Vienna, and Naples, and following them during the year 1849 thousands of political victims from Southern Germany, Hungary, Italy and Austria. But this sudden return of fortune did not teach the victors. Everywhere, but especially in Austria and Italy, the voice of vengeance made itself heard against the proscribed."³ As the aftermath of these revolutionary uprisings, Russia and Austria demanded from Turkey the extradition of five thousand Hungarians and Poles, at least the leaders of the revolt, who had taken refuge in the latter country, invoking certain old treaties of doubtful application. Austria relied upon the treaties of Passarowitz of 1818 and of Belgrade of 1739 which made it unlawful for either of the signatory powers to give shelter to rebels or malcontents and gave either party the option of either punishing or expelling them. Russia invoked the treaty of Kainardji of 1774 according to which subjects of the two empires, who, having committed any capital offence or been

1 Martens, *Recueil*, XXIII, 44.

2 Grivaz, *op. cit.*, p. 86.

3 Grivaz, *op. cit.*, p. 89; Carl Schurz's *Reminiscences* (1907), vol. I, contains a vivid account of the revolution of 1848 in Germany. The author himself was a revolutionist and political refugee.

guilty of disobedience or treason in the territories of one of the two powers, should seek an asylum in the territories of the other were not to be sheltered, but immediately delivered up or at least expelled in order that coolness or useless disputes might not arise between the two empires on account of such criminals. Backed up by England and France, Turkey stiffened in her refusal to deliver up Kosuth and others in view of which Russia and Austria severed diplomatic relations with Turkey. Finally, however, the demands were withdrawn and diplomatic relations restored.

Lord Palmerston, after due examination of the claims of Russia and Austria, arrived at the conclusion that Turkey was not bound by treaty to deliver up the refugees. In a dispatch to the British ministers at Vienna and St. Petersburg he laid down the rule with reference to political offenders in a clear and concise statement. "If there is one rule," he said, "which more than another has been observed in modern times by all independent States, both great and small, of the civilized world, it is the rule not to deliver up political refugees, unless the State is bound to do so by the positive obligations of a Treaty; and her Majesty's Government believe that such Treaty engagements are few—if indeed, any such exist. The laws of hospitality, the dictates of humanity, the general feelings of mankind forbid such surrenders; and any independent Government, which of its own free will were to make such surrender, would be deservedly and universally stigmatized as degraded and dishonoured."¹

FINAL RECOGNITION OF THE DOCTRINE OF NON-SURRENDER OF POLITICAL OFFENDERS

The foregoing pronouncement of Lord Palmerston marked definitely the triumph of the principle of non-extradition of political offenders. Mohl, a German jurist, was, however, of the opinion that it was an incorrect statement

¹ Viscount Palmerston to Lord Bloomfield and Viscount Ponsonby, Oct. 6, 1849. *British and Foreign State Papers*, 1849-1850, I, 1295; *Annual Register*, 1849, pp. 341-342; the provisions of the treaty of Rutschuck Kainardji of 1774 between Turkey and Russia and the treaty of Belgrade between Turkey and Austria were discussed in the Koszta, case. See *Cong. Doc.* H. of R. 33d Cong. 1st Sess. Ex. Doc. 91, pp. 34, 45.

of the positive law of Europe.¹ It is true that this principle in favor of the right of political asylum laid down by Lord Palmerston was not in accord with the policy of the leading continental powers, but the opinion of the famous British statesman soon prevailed as an axiom of international law.² Even the great continental powers which had strongly opposed the new principle soon recognized it in their treaties. Thus, the treaties concluded by Russia with Bavaria in 1869, with Switzerland, November 17, 1874, and with Austria, November 15, 1874, contain inhibitions against the extradition of political offenders.³ Austria recognized the principle for the first time in the treaty of 1853 with Belgium. Prussia concluded treaties containing similar provision with Belgium in 1836, with France in 1845, and with the Low Countries in 1850.⁴

REACTION AGAINST THE PRINCIPLE

Until 1856 treaties were so framed as to exempt only those accused of political offences or of common crimes connected with acts of a political character. That year saw the first limitation upon the principle of political asylum as the consequence of an attempt against the life of Emperor Napoleon III. In September, 1851, a bomb was discovered on the railroad between Lille and Calais placed there in order to destroy the imperial train bound for Tournay. Two Frenchmen who were suspected of being the authors of the plot to kill the emperor fled to Belgium from which country their extradition was demanded by the French government. Celestin Jacquin, one of the accused, was put under provisional arrest by the Belgian authorities pending his extradition to France. It was contended by the accused that the crime imputed to him was not provided by the convention concluded between Belgium and France, and that, moreover, it was of a political character. The *chambre des mises en accusation* held that the offence with

¹ *Revision der volkerrechtlichen Lehre vom Asyle*, in the *Zeitschrift fur die gesamte Staatswissenschaft*, 1853, pp. 461, 486, cited by Gibbs.

² Weiss-Lammasch, *op. cit.*, p. 34.

³ Stieglitz, *op. cit.*, pp. 92-93.

⁴ Weiss-Lammasch, *op. cit.*, p. 35.

which Jacquin was charged was political, or at least connected with a political offence, and, therefore, his detention was illegal. Upon appeal the judgment was reversed by the Court of Cassation of March 12, 1855, on the ground that the act was not exclusively of a political character and against the natural and immutable laws of human conscience and as such penalized by the penal laws of all nations. Pursuant to the Belgian law, the opinion of the *chambre des mises en accusation* at Brussels was requested by the government. This body advised the government that the accused ought not to be extradited. At the same time public opinion was favorable to the accused. To save the Belgian government from further embarrassment, the French government withdrew its demand.

THE ATTENTAT CLAUSE

As a result of this incident, the chamber of deputies passed a bill on March 14, 1856, amending Art. 6 of the law of October 1, 1833, which reads: "An attempt against the life of the head of a foreign government or against that of any member of his family when that attempt constitutes the act either of murder or assassination, or of poisoning shall not be considered a political offence or an act connected with such an offence." The bill was passed by the senate at its session of March 18, 1856. During the debate on the bill there were various objections thereto on the ground that it might open the door to the extradition of political offenders. The purpose of the law is well explained in the following excerpt from the report presented to the chamber of deputies: "Regicide, by common consent, ought henceforth to be indisputably treated as homicide in Belgium. The life of a foreign sovereign shall receive equal protection as that of any foreigner, without distinction of rank, no more no less. To do more would be, in effect, to make of regicide a political offence by a sad privilege and to admit what we all reject—the political extradition. To do less would be to put the foreign prince out of the protection of the law and to sanction an injustice."¹

¹ Billot, *op. cit.*, pp. 113-116; Calvo, *op. cit.*, II, pp. 584-586; Moore, *Extradition*, I, pp. 309-310.

The above-cited legal provision was embodied in the Franco-Belgian convention of September 22, 1856, without any modification and has been reproduced in modern extradition treaties except those of England, Italy, and Switzerland. Italy was prevented by the provision of her penal code from adopting the Belgian clause in her extradition treaties for an attempt against the life of a foreign prince comes within the category of offences *contro la sicurezza esterna dello stato* and therefore a political offence.¹ In 1892 Switzerland enacted an extradition law in which the principle of political asylum is recognized. It also provides that a mere allegation of political purpose or motive shall not be a bar to extradition if the character of the act wears more the aspect of a common than a political offence, giving the federal tribunal (*Bundesgericht*) power to decide the extraditability of an individual according to the particular circumstances of each case. It does not exclude absolutely the possibility of regicide being considered as a political offence, while, on the other hand, it renders possible the extradition for all other offences against the person and property unless the political character constitutes the chief feature of such offences.² At the outset the United States was opposed to the inclusion of the Belgian clause in her treaties. But finally she gave up her objections and her treaties with Belgium of 1882 and with Luxemburg of 1883 contain provisions similar to that of the Franco-Belgian convention of September 22, 1856. The much criticized treaty concluded between the United States and Russia in 1887, contained an *attentat* clause.³ The present tendency is to regard regicides as enemies of mankind regardless of the political question involved and thus renders them extraditable.

1 Fiore, *Effetti internazionali delle sentenze e degli atti*, (1877) II, 197; Weiss-Lammasch, *op. cit.*, p. 63; Bruno, *Codice penale del regno d'Italia*, Title I, Art. 117, p. 238.

2 Berney, "La nouvelle loi suisse sur l'extradition des malfaiteurs aux pays étranger", *R. D. I.* (1892), p. 219. Extracts from the law are found in Saint-Aubin, *op. cit.*, II, 988-990 with comment of the author. See also Oppenheim, *International Law*, I, 517-518; compare Grivaz, *op. cit.*, 98-99.

3 This treaty is vigorously criticized by Isaac A. Hourwich in an article published in the *Yale Review*, O. S. III, (1895) 68. See also the speech of William M. Slater delivered before the Society for Ethical Culture of Philadelphia at New Century Hall, March 26, 1893.

As to the merits and demerits of the so-called *attentat* clause, we shall have more to say later. Prior to this convention, there had been several cases of surrender of persons accused of anarchistic crimes. Thus, in 1835 Prussia delivered up Bardou, who was implicated in the Fieschi affair, to France. In 1845 France obtained from Switzerland the extradition of an individual accused of attempted regicide, and, in 1848, she surrendered the assassins of the Duke of Liechtenstein. Foreign governments intimated their readiness to surrender the assassins of President Lincoln should they be found within their respective jurisdictions. President Guzman Blanco of Venezuela ordered the extradition of William Westgate, alias Michael O'Brien, who was implicated in the Phenix murder on August 7, 1882.¹ Recently Spain obtained the extradition of the assassins of Premier Dato from Germany.²

ANARCHISTIC CRIMES

Political assassination is as old as history itself. From the time of the murder of Caesar by Brutus, which has been immortalized by Shakespeare, to date, history is replete with such crimes. Good and bad rulers have perished indiscriminately at the hands of assassins.³ In an interesting book entitled *Political Crime* by Monsieur Louis Proal, a judge of the Court of Appeal at Aix, the learned author portrays a rather gloomy picture of democracy and attributes to the Machiavelian principle the cause of anarchistic crimes.⁴ The frequent assassination of rulers,⁵ the excesses of the Paris communists and the chronic revolutions in some of the countries in Latin America have produced a public opinion none too favorable to political offenders. As a result various attempts have been made to restrict the principle of political asylum. These various projects are discussed in the fifth chapter. The main difficulty lies in the conception of political offence. In its report to Parlia-

1 Moore, *Extradition*, I, pp. 310-316 and p. 308, note 4; Billot, *op. cit.*, p. 113.

2 *Am. Jour. Int. Law*, XVI (1922), 542, *et seq.*

3 Sullivan, *op. cit.*, Introduction.

4 Chs. 1, 2.

5 Oppenheim, *op. cit.*, I, 518, note, contains a list of murdered rulers.

ment, the British Royal Commission of 1878 on Extradition endorsed the Belgian clause. As a consequence of the assassination of Alexander II of Russia in 1881, Russia proposed a conference by the powers to deal with the question which failed on account of the objections of France and England. She was, however, successful in concluding treaties in 1885 with Prussia and Bavaria which provided for the extradition of all persons who had made an attack on the life, the body, or the honor of a monarch, or of a member of his family, or who had committed any kind of murder, or attempt to murder. Her extradition treaty with Spain of 1888 abandoned the principle of political asylum altogether.¹ She had, however, to adopt the *attentat* clause in her extradition treaties with other countries.²

THE GENEVA RESOLUTIONS OF THE INSTITUTE

At a meeting of the Institute of International Law at Geneva in 1892, elaborate provisions were made for determining what acts should not be considered political, thus modifying Arts. 13 and 14 of the Oxford resolutions. It was provided that extradition should not apply to purely political offences nor to connected offences except those crimes of "great gravity from the point of view of morality and of the common law." Acts committed during an insurrection or in a civil war should not give rise to extradition except when those acts are of odious character and forbidden by the laws of war. Anarchistic crimes are not excepted from extradition.³ The failure to adopt the recommendations of the Institute shows that the powers are loath to be bound by hard and fast rules that might interfere with their freedom of decision.

¹ *Ibid.*, p. 528. Among the extradition crimes provided for in said treaty are: Delitos de lesa majestad contra el Soberano é individuos de su familia.... 2. Traición que comprometa la paz ó la independencia del Estado. 3. Conspiración ó rebelión. Walls y Merino, *op. cit.*, pp. 354-355; *Colección general oficial de Tratados del Archivo del Ministerio de Estado*, V, No. 387.

² Oppenheim, *op. cit.*, I, 528.

³ *Annuaire*, XII, pp. 182-183; for English translation see Westlake, *International Law*, (Cambridge, 1904) I, 246-247; *Resolutions of the Institute &c.*, collected and translated under the supervision of and edited by James Brown Scott, Carnegie Endowment for International Peace (Oxford University Press, 1916).

POLITICAL OFFENCES IN MODERN EXTRADITION
TREATIES AND STATE CONSTITUTIONS

With the exception of the peace treaties of 1919 which impose upon Germany and her associates in the late war the obligation of surrendering the so-called war criminals, including the former German Kaiser, to the Allied and Associated Powers, all modern extradition treaties forbid the extradition of political offenders. The treaties of international penal law and extradition signed at Montevideo, January 23, 1889, and at the city of Mexico, January 28, 1902, between the Latin American states; the extradition convention of December 20, 1907, between the Central American countries; the project of convention of extradition submitted by the American Institute of International Law to the Governing Board of the Pan American Union for the consideration of the International Commission of Jurists; and the report on extradition prepared by the Committee of Experts for the Progressive Codification of International Law under the auspices of the League of Nations contain express inhibitions against the surrender of political criminals.

In some countries the principle is consecrated in the fundamental law. Recently it has been vigorously reaffirmed in those constitutions of revolutionary origin. Thus, the constitution of the Russian Socialist Federal Soviet Republic states that the Soviet government "grants the rights of asylum to all foreigners persecuted for political and religious offences."¹ The new Mexican constitution prohibits the conclusion of any treaty authorizing the surrender of political offenders as well as slaves.² The constitution of the German Reich is worded thus: "The generally recognized rules of International Law are valid as binding constituent parts of the Law of the German Reich."³ This type of clause has been reproduced in the constitutions of Austria and Esthonia.⁴ Although the German model is not explicit as to political offences, it is believed, that in view of

1 *Select Constitutions of the World*, Art. 21, p. 223.

2 *Ibid.*, Art. 15, p. 244.

3 *Ibid.*, Art. 4, p. 179.

4 *Ibid.*, Art. 9, p. 88; Art. 4, p. 127.

the universal recognition of the doctrine and by its assimilation to German municipal law, political criminals would be as amply protected under it as under the usual form. Other countries have passed laws affording asylum to political refugees in addition to regular treaty stipulations.¹

POLITICAL OFFENCES IN INTERSTATE RENDITION

It may not be amiss to state that the doctrine of non-extradition of political offenders does not obtain in interstate rendition. The question was settled in *Kentucky v. Dennison*² in which the Supreme Court, speaking through Chief Justice Taney, held that Art. IV, sec. 2, cl. 2 of the Federal Constitution which provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime" applied equally to political and common offences. Taney also observed that there was no provision in the Federal Constitution under which the governor of a state might be compelled to surrender a fugitive criminal to another state. He said the words treason and felony were introduced "for the purpose of guarding against the restriction of the word 'crime', and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages even where they admitted the obligation to deliver the fugitive persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence." In other words the constitution makes no distinction between political and common offences. The word "treason" was inserted therein so as to include political offenders. The same rule obtained in the former German Confederation and in the German empire. The penal code of Germany which went into effect in 1872 made the extradition of political offenders obligatory between the

¹ Fauchille, *op. cit.*, part 1, p. 1015.

² 24 Howard 66; Ed. 717.

states composing the former German empire. In Switzerland under the constitutions of 1848 and 1874, one canton is not bound to deliver up political offenders to another.¹

C O N C L U S I O N

To recapitulate, the conception of a political offence is not static but dynamic. It was not until public law had been rationalized that distinction between political and common offences became possible. Progress in this direction synchronized with the development of democratic institutions. During the period of absolutism extradition treaties were especially directed against political offenders for obvious reasons. As democracy spread, the former practice of surrendering political offenders had been reversed, thus giving rise to the modern practice of excepting this class of offenders from the operation of extradition treaties. The liberal powers of Europe were naturally the first to proclaim this principle, at first, as a matter of policy, and finally, as an accepted axiom of international law.

1 "Extradition from one Canton to another will be dealt with by Federal legislation, but extradition may not be made obligatory for political or Press offences." *Select Constitutions of the World*, Art. 67, p. 446. Weiss-Lammasch, *op. cit.*, p. 32; Stieglitz, *op. cit.*, pp. 93-94; Bernard, *op. cit.*, II, 302-306.

CHAPTER II

EXTRADITION TREATIES OF THE UNITED STATES AND THEIR INTERPRETATION

The expression "political offence" is nowhere defined in the treaties and statutes and its determination has been left with the executive and judicial branches of the government. As already stated, the extradition clauses of the treaties of 1794 and 1842 with Great Britain did not contain any express stipulations prohibiting the surrender of political offenders on the theory that their exclusion from the operation of extradition treaties is already understood.¹

The first treaty negotiated by the United States with a foreign power which expressly provided for the non-extradition of political offenders is that of 1843 with France. It was agreed that the provisions of the said convention "shall not be applied in any manner . . . to any crime or offence of a purely political character."² The term "purely political character", which gave rise to an animated controversy between the governments of the United States and Mexico as to its meaning, also appears in the treaty of 1861 with Mexico,³ and the one with Peru in 1870.⁴

It might be said in passing that little can be gained by perusal of the treaties concluded by the United States with foreign powers which might throw light upon the meaning of the expression "political offences". Their loose and unscientific wording often gives rise to fruitless controversies. For instance, a somewhat curious provision is found in the treaty of 1855 with the Two Sicilies. It says: "...Nor shall they (stipulations of the preceding articles) apply . . . to offences of a political character, unless the political offender shall have also been guilty of some of the

¹ See note 1, p. 26.

² France, *Extradition Convention*, 1843.

³ Mexico, *Extradition Convention*, 1861.

⁴ Peru, *Extradition Convention*, 1870.

crimes enumerated in Article XXII.¹ This is a very ambiguous provision. It would seem from the foregoing provision that only those accused of absolute political offences are excepted from the operation of the treaty. Would the mere commission of some of the offences mentioned in the treaty preclude an examination into the offence charged? This would seem a very arbitrary interpretation and would surely defeat the principle of non-surrender of political offenders universally recognized in practice. Moreover, it is highly improbable that the American negotiator of the treaty would deliberately surrender the right of political asylum so dear to American hearts. This treaty, of course, is now obsolete on account of the annexation of the Two Sicilies to the Kingdom of Italy and is only thrown in to show how loosely some of the extradition treaties have been framed.

In the San Ignacio Raid the question arose as to whether or not the exception is limited to the so-called pure or absolute political offences by the use of the word "purely". It was vigorously urged by the Mexican government in seeking the extradition of Guerra that only those accused of absolute political offences were excepted from extradition under the treaty. Secretary Sherman maintained, however, that the insertion of the word "purely" in the treaty did not impose any such limitation. His reasoning was that, inasmuch as the so-called pure or absolute political offences are already excepted from the operation of extradition treaties by implication, the expression "purely political offences" as used in the treaty of 1861 should be interpreted to mean relative political offences otherwise the exception would be valueless.² The treaty was denounced by Mexico, but the

1 Two Sicilies, *Convention of Amity, Commerce, Navigation, and Extradition*, 1855. See comment of Fauchille, *op. cit.*, I, 1020. This treaty was severely criticized by W. B. Lawrence. "Had any of those illustrious citizens whom I found within the walls of a prison, been enabled to join their more fortunate compatriots, and if by any device a mandate of arrest could have been obtained against them under pretense of any one of the offences enumerated in the treaty, what would have been their fate, however innocent of the ordinary crime, if as the treaty permitted, a political one could have been connected with it. The existence, indeed, of a treaty whatever its provisions, with such a State as the Two Sicilies was at the time, is sufficient condemnation of the whole system of extradition." 14 *Alb. Law Journal*, p. 92.

2 Moore, *Digest*, IV, 337-351.

same expression is found in the later treaty of 1899.¹ The views taken by the State Department is supported by such writers as Lammasch and Rivier. According to the former the clause in a treaty which exempts from extradition political offenders is applied only to those charged with the so-called relative political offences. Any other interpretation would deprive the clause of sense and utility. The fact that absolute political offences are excluded from extradition crimes and that a state is bound by no obligation to surrender an offender for an act not specifically mentioned in the treaty is sufficient protection for one charged with such crimes. A formal prohibition against the surrender of those accused of absolute political offences would seem therefore superfluous.²

The French clause has been reproduced in subsequent treaties with little modifications in phraseology. In all these treaties the word "purely" is omitted. Thus, the treaty of 1850 with Switzerland provides: "The provisions of the foregoing articles relating to the surrender of fugitive criminals shall not apply to offences committed before the date hereof, nor to those of a political character."³ Later on provisions regarding the non-extradition of fugitives charged with relative political offences were inserted in the treaties. The reason for this was apparently to provide further safeguard for political offenders. This clause appears in the treaty of 1880 with the Netherlands which states: "The provision of this convention shall not apply to any crime or offence of a political

1 Mexico, *Extradition Treaty*, 1899.

2 Weiss-Lammasch, *Droit d'extradition appliqué aux délits politiques*, pp. 43-44; Rivier, *principes du droit des gens*, I, 353; see also the report of Renault on extradition in *Annuaire*, V. 84.

3 Similar provisions are found in the following treaties: Austria Hungary, *Extradition Convention*, 1856; Baden *Extradition Convention*, 1857; Belgium, *Extradition Convention*, 1874; Dominican Republic, *Convention of Amity, Commerce and Navigation and for the surrender of Fugitive Criminals*, 1867; Ecuador, *Extradition Convention*, 1872; Hayti, *Treaty of Amity, Commerce and Navigation, and Extradition*, 1864; Italy, *Extradition Convention*, 1868; Nicaragua, *Extradition Convention*, 1870; Ottoman Empire, *Extradition Treaty*, 1874; Salvador *Extradition Convention*, 1870; Sweden and Norway, *Extradition Convention*, 1860; Venezuela, *Treaty of Amity, Commerce, Navigation and Extradition*, 1860; Orange Free State, *Convention of Friendship, Commerce and Extradition*, 1871.

character, nor to acts connected with such crimes or offences; and no person surrendered under the provision hereof shall in any case be tried or punished for a crime or offence of a political character, nor for any act connected therewith, committed previously to his extradition."¹ In view of the interpretation given by the courts and the views of the State Department as to the meaning of "political offences" it may be doubted whether the employment of the phrase "acts connected with such crimes" is of any value at all. It is well settled that political offences include not only the so-called absolute political offences but also such common offences as are connected therewith. A political offender is, therefore, no better protected under this clause than he is without it.

Not infrequently treaties provide further that a fugitive who has been surrendered shall not be tried or punished for a political crime or offence committed previously to his extradition. In view of the universally accepted practice that a surrendered fugitive can be tried only for an offence for which he was extradited,² the utility of some such provision may also be doubted. In addition to the foregoing provision some of the treaties allowed the surrendered fugitive a certain length of time within which he should leave the country before he could be prosecuted for another offence. An example of such provision is found in the treaty of 1883 with Luxemburg which states: "A person who has been surrendered on account of one of the common crimes or offences mentioned in Article 2 shall consequently in no case be prosecuted and punished in the State to which his extradition has been granted on account of a political crime or offence committed by him previously to his extradition or on account of an act connected with such a political crime or offence, unless he has been at liberty to leave the country for one month after having been tried and, in case of condemnation, for one month after having suffered his punishment or having been pardoned."³

1 Similar provisions exist in the extradition convention of 1877 with Spain.

2 *U. S. v. Rauscher* (1886), 119 U. S. 407.

3 The following treaties contain analogous provisions: Guatemala, *Extradition*

It is further stipulated in some of the treaties that the decision of the asylum state as to whether or not an offence is political shall be final. The treaty with Uruguay of 1905, for instance, provides: "If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government on which the demand for surrender is made, or which may have granted the extradition, shall at the time be final."¹

A somewhat different provision appears in the treaty with the Argentine Republic² in which it is stipulated that "the decision of the judicial authorities of the country to which the extradition is directed will be final." This provision has been criticized since the revisory power which the Secretary of State possesses over the decisions of the committing magistrate, in case the latter holds that the offence with which a fugitive is charged is not of a political character, would seem to have been bargained away.³ In view of the settled practice that only in the asylum state can the political character of the offence be raised that additional provision would appear superfluous. It is true that in the *Burley* case the court held, citing the dictum of Chief Justice Cockburn in the case of *Tivnan*, that the question whether or not the offence was political must be decided by the jury. This decision is generally regarded as erroneous. When the same contention was made by counsel for the United States in the more famous case of the *St. Albans Raid*, Judge Smith disposed of it in a well considered opinion:

Convention, 1888; Mexico, *Extradition Treaty*, 1899; Nicaragua, *Extradition Treaty*, 1905; San Marino, *Extradition Treaty*, 1906; Hayti *Extradition Convention*, 1904.

¹ Argentine, *Extradition Convention*, 1896; Bolivia, *Extradition Convention*, 1900; Chile, *Extradition Convention*, 1900; Brazil, *Extradition Convention and Protocol*, 1897; Denmark, *Extradition Treaty*, 1902; Great Britain, *Extradition Convention*, 1889; Norway *Extradition Convention*, 1893; Orange, Free State, *Extradition Treaty*, 1896; Panama, *Extradition Treaty*, 1904; Servia, *Extradition Treaty*, 1901; Sweden, *Extradition Treaty*, 1900; France, *Extradition Convention*, 1909; Cuba, *Extradition Treaty*, 1904.

² Argentine, *Extradition Convention*, 1896.

³ Address of Mr. J. Reuben Clark, Jr., *Proceedings*, Am. Soc. Int. Law, 1909, III, 117.

There is no doubt whatever, if the case stood exactly as it is presented by the examination of the witnesses for the prosecution, that it would fall under the provision of municipal law; for the facts proved by them, so far as they stand unexplained or uncontradicted by other facts, present a clear case for extradition. But contrary to this view of the law contended for on behalf of the appellants, I hold that I am bound to consider whether the prisoners are really robbers; or, as they contend, soldiers and subjects of a belligerent, engaged in a hostile expedition against their enemy, under the authority and on behalf of their Government; and whether or no the act charged was a mere incident to that hostile expedition. And although I have no right to try this case, it is my duty to investigate it, so as to ascertain whether or no the offence committed falls within the provisions of the Treaty, before I commit these men for extradition.¹

So In *re Ezeta* the power of the committing magistrate to inquire into the nature of the offence was questioned by counsel for the government of Salvador who contended that that power was vested in the executive. Judge Morrow held that under the treaty he had such power.² In the Lynchehaun case Commissioner Moores justly remarked: "This is the only forum where the prisoner can try the question as to the political character of his crime. After he shall have been surrendered it will be too late to show by way of defense that his crime was political."³ It is alleged by those who oppose the present practice of allowing the committing magistrate to determine the character of the offence charged when the extradition is objected to on the ground that the crime committed is political, that it involves the determination of a political question which is proper only for the executive branch to decide.⁴ It is submitted that there is no analogy between the principles of law governing the recognition of a new state or new government and those concerning the non-extradition of political offenders. Political offence as a defense has nothing to do with recognition. As a matter of fact, with the exception of a few cases which arose out of the Civil War was the question of belligerency ever raised. The committing magistrate therefore in inquiring into the nature of

1 L. N. Benjamin, *The St. Albans Raid*, pp. 448-449.

2 In *re Ezeta*, 62 Fed. Rep. 972, 996.

3 *Irish American Victory Over Great Britain*, (Indianapolis, 1903) p. 125.

4 See address of Frederic Coudert, *Proceedings*, Am. Soc. Int. Law (1909), II, 124.

the offence is not passing upon the political status of any revolutionary party but merely allows proof of the existence of a revolt as any other questions of fact for the purpose of deciding the main question; that is, whether or not an offence partakes of a political character.¹

An examination of the treaties negotiated by the United States with foreign powers at the close of the 19th century shows that the provisions of the British Extradition Act of 1870 relating to political offenders have been copied with slight modification. Article 2 of the treaty of 1889 with Great Britain, which is typical of such treaties, reads in part: "A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character..."² In some of the earlier treaties concluded by the United States with foreign countries a slightly different wording is employed. An example of such treaties is that with Russia of 1887 which states: "If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offence of a political character, surrender shall not take place..."³ According to one authority,⁴ there is no essential difference between the British clause and the Russian clause. The former does not require proof of an ulterior motive of the demanding government any more than the latter does. Other-

1 See address of J. Reuben Clark, *op. cit.*, p. 95. "There are, it is true, certain political questions, such as that of recognizing a new government, which it is the peculiar province of the executive or political power to determine; but, the connection between the exercise of political power and the determination of the question whether an offence is of a political character may be regarded as merely nominal." Moore, "The case of the Salvadorean Refugees," *Am. Law Review*, XXIX (1895), 16.

2 Similar provisions exist in the following treaties: Bolivia, *Extradition Convention*, 1900; Chile, *Extradition Convention*, 1900; Cuba, *Extradition Treaty*, 1904; Denmark, *Extradition Treaty*, 1902; Norway, *Extradition Convention*, 1893; Panama, *Extradition Treaty*, 1904; Peru, *Extradition Treaty*, 1899; Servia, *Extradition Treaty*, 1901; Sweden, *Extradition Treaty*, 1893; France, *Extradition Convention*, 1909.

3 Similar provisions are found in the treaties with Columbia and Japan of 1838 and 1886, respectively.

4 J. Reuben Clark, Jr., *op. cit.*, p. 110-111.

wise it would impose upon the fugitive claiming the benefit under the British clause an almost impossible burden of proving an intent of the demanding government to try him for a political offence. The language, however, of the treaty of 1897 with Brazil is unequivocal. It provides that "extradition shall not be granted if the offence on which the surrender is demanded be of a political character, or if the fugitive *prove that there is an intention* to try or punish him for a political crime..."¹ In view of the attitude of the courts in refusing evidence which purports to question the motive of the demanding government and the general presumption that extradition proceedings are made in good faith,² the above provisions would indeed be difficult to interpret.

In *re Arton*³ the question came up before the Queen's Bench division involving the interpretation of Section 3, sub. s. 1 of the Extradition Act of 1870 which, as already remarked, is identical in language to the treaty of 1889 with Great Britain. The extradition of Arton was demanded by the French government on several charges which need not be detailed here. Counsel for the defedant opposed his extradition on various grounds among which were that the demand was not made in good faith and that the object of the French government in demanding his surrender was in fact to interrogate him concerning the Panama canal scandal. It was contended that inasmuch as the failure of the accused to give the information desired by the government would result in his punishment, his extradition should be refused as it comes within the purview of the statute which prohibits surrender "with a view to try or punish

1 Brazil, *Extradition Convention and Protocol*, 1897. Commenting on this treaty, Mr. Julian W. Mack declared: "The latter clause would be totally unnecessary and superfluous if it did not have this meaning, viz: that irrespective of whether the offence is clearly political or not, if it be shown that the demanding government intended to try the accused as a political offender he is not to be extradited." *Proceedings*, Am. Soc. Int. Law, III, 157.

2 J. Reuben Clark, Jr. *op. cit.*, p. 111.

3 *In re Arton* (1896), 1 Q. B. D. 108. For criticism of this decision, see "The Extradition of Arton", *Law Times* (Nov. 1895- April, 1896), vol. 100, 212; "Political Offences and Extradition", *Law Journal* (1896), vol. 31, 109-111; "The Extradition of Arton", *The Green Bag* (1896), vol. 8, 100-101.

the person demanded for an offence of a political character." Russell, C. J., held that the question whether or not the French government acted in good faith in demanding the extradition of Arton is a political question which the court is incompetent to inquire into. He further held that the provision of the Extradition Act of 1870 by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the court that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character, applies only to a political offence already committed and not to a political offence which might be committed. It is not improbable that the State Department was not altogether unaware of the ambiguity of the British clause and it is perhaps with a view to avoid such ambiguity that the British pattern does not appear in more recent treaties.

There has been a tendency lately to adopt a uniform type of political offence clause. This standardized form is found for instance in the treaty with Portugal of 1908 which provides: "The provisions of this Convention shall not import claim of extradition for any crime or offence of political character, nor for acts connected with such crimes or offences; and no person surrendered by or to either of the Contracting Parties in virtue of this Convention shall not be tried or punished for a political crime or offence."¹ It is believed that the expression "shall not import" is understood to mean in the same sense as the expressions "shall not be applied," "shall not be surrendered," "surrender shall not take place," "shall not be granted," "expressly excepted", and "nothing shall be construed," found in earlier treaties.

In some of the treaties concluded between the United States and other powers, provisions are made for the surrender of those fugitives as might have been guilty of

¹ The following treaties contained identical provisions: Honduras, *Extradition Convention*, 1909; Paraguay, *Extradition Treaty*, 1913; Costa Rica, *Extradition Treaty*, 1922; Venezuela, *Extradition Treaty*, 1922; Siam, *Extradition Treaty*, 1922; Latvia, *Extradition Treaty*, 1923; Esthonia, *Extradition Treaty*, 1923; Lithuania, *Extradition Treaty*, 1924; Roumania, *Extradition Treaty*, 1924; Finland, *Extradition Treaty*, 1924; Bulgaria, *Extradition Convention*, 1924.

murder of the head of either contracting states or any member of his family.¹ The treaty of 1882 with Belgium is the first treaty negotiated by the United States which contains the so-called *attentat* clause. It provides: "An attempt against the life of the head of a foreign government, or against that of any member of his family when such attempt comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offence or an act connected with such an offence." In the treaty of 1897 with Brazil this protection was extended to the vice-presidents, governors, and lieutenant-governors of the respective states. The clause excluding political offenders from extradition, like the rest of the treaty, should be interpreted liberally, and in case of doubt it must be resolved in favor of the accused.²

1 Belgium, *Extradition Convention*, 1882; Brazil, *Extradition Convention and Protocol*, 1897; Cuba, *Extradition Treaty*, 1904; Denmark, *Extradition Treaty*, 1902; Guatemala, *Extradition Treaty*, 1903; Hayti, *Extradition Convention*, 1904; Luxemburg, *Extradition Convention*, 1883; Mexico, *Extradition Treaty*, 1899; Portugal, *Extradition Convention and Exchange of Notes Concerning Death Penalty*, 1908; Russia, *Extradition Convention*, 1887; Spain, *Extradition Treaty and Protocol*, 1904; Costa Rica, *Extradition Treaty*, 1922; Honduras, *Extradition Convention*, 1909; Paraguay *Extradition Treaty*, 1913; Venezuela, *Extradition Treaty*, 1922; Siam, *Extradition Treaty*, 1922. The *attentat* clause is also found in recent treaties negotiated by the United States with the new states of Europe.

2 *Irish-American Victory over Great Britain* (Indianapolis, 1903), p. 125; *In re Ezeta*, 62 Fed. Rep. 972, 999; Moore, *Digest*, IV, 346; Calvo, *op. cit.*, II, 582.

CHAPTER III

CASES INVOLVING POLITICAL OFFENCES

A. RELATIVE POLITICAL OFFENCES

1. ANGLO-AMERICAN INTERPRETATION

The cases involving political offences are few in number. One will seek in vain to find in these cases a concrete and definite solution of the problem. The British and American courts prefer to deal with the question as each case arises. The same attitude has been adopted by the Swiss Federal Tribunal (*Bundesgericht*).

IN RE TIVNAN

During the Civil War four cases involving the surrender of political offenders arose, three of which were decided by the Canadian courts and one by the House of Lords. In the case of Tivnan¹ and others, the United States government demanded their extradition on the charge of piracy. The facts showed that the accused had taken passage on the steamer *Joseph L. Gerrity* at Matamoras, Mexico. After the ship had sailed from port, Tivnan and his companions surprised the crew and took possession of the ship. There was slight evidence that they had acted on behalf of the Confederate government. The court held that if they were guilty of any crime at all it was piracy *jure gentium* which was also triable in England. Piracy "committed within the jurisdiction" as stipulated in the treaty of 1842 meant piracy by municipal law. Thus the political aspect of the case was finally avoided.

THE CHESAPEAKE

In the case of the *Chesapeake*² the passengers took forcible possession of the ship and murdered the second mate. They subsequently fled to Canada from which country their extradition was demanded by the Federal government on

¹ Best & S. 5, 645; *Dip. Cor.* 1864, part 2, p. 30 *et seq.*; Moore, *Extradition*, I, 316.

² Moore, *Extradition*, I, 316.

the charges of murder and piracy. The recorder committed them for extradition but they were discharged by Judge Ritchie on some technical grounds. There were subsequent proceedings the result of which could not be determined on account of the loss of the records. According to Judge Moore none of the fugitives was extradited. Neither in this case was the question whether or not the offence was of a political character ever decided.

The above-mentioned cases are important only insofar as they suggest that a political crime may be perpetrated at sea as well as on land. Does the fact that the crime is committed on land or at sea affect the determination of its political character? It would logically seem that if an act is political in nature the *locus* of the offence is immaterial. This is not, however, the case. If the offence is committed on the high seas we are at once confronted by the law governing piracy and a different principle is there applied. It is not our intention to extend our inquiry into this branch of the law except to state that, although traditionally piracy means robbery at sea, there are cases which hold that seizures by unrecognized belligerents, in the absence of a commission, as in the case of Tivnan, are regarded as piratical.¹

THE CANTABRO

An analogous case happened in Venezuela during the revolution of 1882. She demanded from Colombia the extradition of the crew of the steamer *Cantabro*² or *Colon* on the charge of piracy. The *Cantabro* was a raider belonging to the insurgents. Colombia acquiesced in the demand but none of the crew was, however, extradited.

THE CASE OF BURLEY

In the case of the *Philo Parsons*³ the United States government demanded the surrender of Bennet G. Burley

¹ Dickinson, "Is the Law of Piracy Obsolete?", *Harvard Law Review*, XXXVIII, 334, 352.

² Seijas, *Derecho Internacional Hispano-Americano*, I, 118.

³ Moore, *Extradition*, I, 319; *State Papers, North Am.*, No. 3 (1876), vol. 82; "The Lake Erie Piracy Case" by Hon. H. B. Brown, former associate justice of the Supreme Court, *Green Bag*, XXI (1909), 143.

who, with other Confederates, seized the ship in Lake Erie, at a point near the coast of Ohio. The crime charged was robbery. There was strong evidence that the expedition was authorized by the Confederate government. Burley held a commission as an officer of the Confederate navy. In addition to this a proclamation of Jefferson Davis, President of the Confederate government, avowing the acts of Burley and his associates and assuming responsibility therefor, was introduced as evidence. The court unanimously decided, however, that there was a *prima facie* case of robbery as to warrant his extradition. The court also held that proofs in justification of the act must be submitted to the jury at the trial of the accused. Burley was acquitted by the Ohio court.

THE ST. ALBANS RAID

In the *St. Albans Raid*¹ the view taken by the court of Upper Canada was repudiated by Judge Smith. The evidence disclosed that Lieutenant Bennet Young and a number of Confederate soldiers descended from Canada upon the unsuspecting people of St. Albans, Vermont, pillaged the banks, held a number of citizens as prisoners, requisitioned horses to aid them in their escape and attempted to burn the town. The raiders compelled one Breck to give up his money as the latter entered the bank to transact business. This furnished the charge for robbery. One man was killed in the course of the fight. The raiders were finally driven away by the townspeople. The United States government demanded their surrender on charges of murder, assault with intent to commit murder and robbery. It was proved that Young was an officer of the army of the Confederate government. The grounds relied upon by counsel for the defense were that the charges against Young and his associates were belligerent acts and that they were of a political character. The court held:

¹ L. N. Benjamin, *The St. Albans Raid*, Montreal 1865; Speech of B. Devlin, counsel for the United States, in support of the demand for the extradition of Lieutenant Bennet H. Young *et al.* reported by Samuel J. Watson, Montreal, 1865; *Dip. Cor.*, 1864, part 2, pp. 752-757.

I am therefore constrained to hold that the attack on St. Albans was a hostile expedition authorized both expressly and impliedly by the Confederate States; and carried out by a commissioned officer of their army in command of a party of their soldiers. And, therefore, that no act committed in the course of, or as incident to, that attack can be made the ground of extradition under the Ashburton treaty. And that if there had been any breach of neutrality in its inception, upon which point I state no opinion, it does not affect this application, which must rest entirely upon the acts of the prisoners within the territories of the state demanding their extradition, and upon their own status, and authority as belligerents.

Speaking of the political character of the offence, Judge Smith said:

The United States themselves, and all civilized countries, make a wide distinction between offences committed during a normal state of things, and those which are incident to political convulsions, or the unusual condition, politically speaking, of any portion of any country. Under this distinction political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up, whether such delivery is claimed to be due under friendly relationship, or under treaty, unless in the latter case, the treaty expressly includes them..... Political offenders, however, form the most conspicuous instances of exclusion from the operation of the extradition law. No nation of any recognized position has been found base enough to surrender, under any circumstances, political offenders who have taken refuge within her territories or if there be instances, they are few in number, and are recorded as precedents to be reprobated rather than followed.

Of this group of cases decided by the courts of Canada only in the case of Young was the political nature of the offences charged raised as a distinct ground of defense and even in that case the question of belligerency largely determined the issue.

THE MEXICAN REVOLUTIONISTS

Judge Moore reported two extradition cases following the disturbances in Mexico in the 80's. Expeditions by small bands of Mexicans who styled themselves as revolutionists raided unprotected towns of Mexico near the border. One of these cases¹ took place in 1880 when a party of eight

¹ Moore, *Extradition*, I, 324; For. Rel. 1880, p. 788. Mr. Hunter, Acting Secretary of State, wrote the following reply to Mr. Navarro concerning the case of the Mexican revolutionists:

"Sir: I have the honor to acknowledge the receipt of your note of the 3rd instant, requesting the extradition of the eight Mexican revolution-

Mexicans entered the town of Magdalena and exacted sums of money from the people in the alleged prosecution of a revolutionary enterprise and then withdrew into Arizona where they were put under arrest by an officer of the United States army on the charge of violating the neutrality laws. An application for their extradition made by the Mexican government to the local authorities on the charge of stealing cattle and other chattels was refused. A request was then made to the Federal government by Mexico, the Mexican foreign minister asserting that the alleged political motive was but a cloak to cover criminal acts. In reply to this, Mr. Hunter, then Acting Secretary of State, intimated that the charges were of a political character. He said. "The fact, too, that they are charged with being revolutionists shows that whatever may have been their other crimes they may also have been guilty of a political offence for which the treaty stipulates that no extradition shall be granted".

THE CASE OF FRANCISCO J. CAZO

In a similar case involving the surrender of supposed Mexican revolutionists who raided a small town in Mexico in July, 1886, the United States government took the same view. The party, headed by Francisco J. Cazo,¹ made an attack upon the town of Agualeguas. The raiders were in possession of the town for a few days during which time

ists who were in the custody of Captain Rafferty, of the Sixth Regiment of United States Cavalry, now stationed in the territory of Arizona.

"In reply, I have to state that that officer appears to have received the prisoners from the United States marshal there, who probably holds them on a charge of violating the neutrality law of the United States, in making a hostile incursion into Mexico.

"Under the circumstances the answer of the Territorial authorities to the Mexican agent who, it seems, applied for their surrender was necessarily in the negative.

"In any event, it would not be competent for this Department to take any steps with a view to the extradition of the prisoners unless their names shall have been furnished, and the offences with which they are charged shall have been specified. The fact, too, that they are charged with being revolutionists shows that whatever may have been their other crimes they may also have been guilty of a political offense for which the treaty stipulates that no extradition shall be granted."

¹ Moore, *Extradition*, I p. 324. Mr. Bayard, Secretary of State, wrote the following reply to Mr. Romero, dated February 7, 1887:

they had engagements with the government forces, seized horses and committed divers acts of violence. During the attack there was shouting of "Hurrah for Don Francisco J. Cazo" and "Death to the Garra party" by his comrades and Cazo himself left with a resident a proclamation with a view to its publication. The Mexican government demanded the extradition of Cazo and his companions on charges of murder, assault with intent to commit murder, and robbery. The United States government refused to surrender the fugitives. Secretary Bayard, after having carefully reviewed the evidence, replied that the acts of Cazo and his associates "were clearly of political character, and consequently... are not a proper basis for extradition".

IN RE CASTIONI

The leading case on the subject of political offences is *In re Castioni*,¹ decided by the High Court of Justice in England in 1891. The facts are briefly these: Switzerland demanded the extradition of Castioni charged with the murder of Rossi in the town of Bellizona, canton of Ticino.

"I have had the honor to receive your note of the 3d. instant, requesting the extradition, under Article I of the Treaty between the United States and Mexico of 11 December, 1861, of Francisco J. Cazo and his unarmed accomplices, charged with the offences of assault, robbery and murder, committed in the town of Agualeguas, in the State of Nuevo Leon, Mexico, on the 11th, 12th and 13th days of July, 1886.

"After a careful examination of the papers enclosed in your note, I am unable to avoid the conclusion that the acts of Cazo and his associates, who were about thirty or forty in number, were clearly of a political character; and consequently, under the express terms of Article VI of the Treaty above mentioned, are not a proper basis for extradition. The character of the outbreak, the kind and quantity of the property taken, and the mode of attack all lead to that conclusion.

"Although the first assault of Cazo's party was made in the night, there was no effort to conceal the personal identity of the leader, and such property as was taken was manifestly for the purpose of military equipment for which it was adopted.

"The evidence offered of the fact that Cazo led the attack is the testimony of several witnesses that the assailants cried 'Hurrah for Don Francisco J. Cazo,' and at least one witness testifies to the additional and accompanying exclamation of 'death to the Garra party'. Another witness states that Cazo left a proclamation in the hands of a resident of Agualeguas, with a view to its publication.

"Indeed, all the circumstances point to the conclusion that the affair was an avowed partisan conflict".—MS. Notes to Mexico, vol. IX, 248.

¹ *In re Castioni*, 1 Q. B. D. (1891), 149; Evan's *Leading Cases on International Law*, p. 352.

It appeared that a large portion of the inhabitants of Ticino, among whom was Castioni, being dissatisfied with the manner in which the government was being conducted by the party then in power, rose against the government, seized the arsenal from which they took arms and ammunition, disarmed the gendarmes, arrested several government officials and marched upon the palace. Admission to the palace was refused by Rossi and his colleagues and in the course of the attack Rossi was shot and killed by Castioni. The revolutionists then organized a provisional government which remained in power until overthrown by the federal forces. There was no evidence that Castioni had any previous knowledge of Rossi and that the killing of the latter was in order "to pay off an old grudge." Denman, J., held that the offence for which the extradition of Castioni was demanded was of a political character and ordered his release, the killing of Rossi being incidental to the rebellion. The court adopted the definition of Sir James Stephens of political offences as the best available. The court, however, realized the impossibility of framing an all-embracing definition that would cover every conceivable set of circumstances. Said Denman, J.:

I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offence of a political character. The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object and as part of the political movement and rising in which he was taking part.

Speaking of political offences, Judge Hawkins remarked:

I cannot help thinking that every body knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

IN RE MEUNIER

In a case decided three years later by the same court, England ordered the extradition of Meunier¹ to France. Meunier was an anarchist who, after causing explosions at the *Café Véry* in Paris in which two persons were killed and at certain barracks, fled to England. He opposed his extradition on several grounds one of which was that the explosion at the barracks was a political offence, it being an attack on government property. The court refused to discharge the prisoner on the ground that the offence was not of a political character and laid down the rule that in order to constitute an offence of a political character "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of the object, it is a political offence, otherwise not". Tested by this rule, the court arrived at the conclusion that the crime with which Meunier was charged fell short of political offence as there were no two parties struggling for control of the government. The party of anarchy to which the accused belong, according to the court, is the enemy of all governments.

IN RE EZETA

In the case of the Salvadorean refugees² which is the leading authority in the United States on the question of political offences, Salvador made an application to the government of the United States for the surrender of Gen. Antonio Ezeta and a party consisting of officers under him on charges of murder and robbery. The evidence disclosed that Enriquez was taken away from his father's house by an officer under Gen. Ezeta and brought to the latter's headquarters. Upon being told that Enriquez was a spy, Gen. Ezeta ordered him to be hanged. He was accordingly executed in a public plaza. As to the robbery charge, the

¹ *In re Meunier*, 2 Q. B. D. (1894), 415.

² *In re Ezeta*, 62 Fed. Rep. 964; Moore, *Digest*, IV, 334; *Am. Law Review*, XXIX, 9-18; *For. Rel.* 1894, 563-576.

facts were that an officer under Gen. Ezeta demanded of an official of the agency of the International Bank of Salvador and Nicaragua, at Santa Tecla, the sum of \$10,000.00 and accompanied his demand with threats. However, only \$2,884.00 were found in the vault, which sum was taken away and delivered to Gen. Ezeta, who in turn delivered it to the paymaster of his forces. As regards the charge of murder of Canas, the evidence showed that he was shot by Gen. Ezeta and Cienfuegos in an altercation. It is alleged by the defense and the court found that Canas, a former officer under Ezeta, had proved traitorous to his trust by surrendering a force under his command. It was held by Judge Morrow in an elaborate opinion that the charges were of a political character. Colombia likewise refused to extradite ex-President Ezeta, brother of Gen. Ezeta, to Salvador on various grounds among which was that the charges were of a political character for which surrender is prohibited by her penal code.

ORNELAS V. RUIZ

In the San Ignacio Raid,¹ the only case to reach the Supreme Court, an important doctrine is laid down that the court cannot on *habeas corpus* review the decision of the committing magistrate if there is sufficient evidence to support his conclusion. There it appeared that a band of supposed Mexican revolutionists crossed the Rio Grande from Texas and surprised a small garrison of Mexicans stationed at San Ignacio. In the course of the attack some of the soldiers at the garrison were killed, others wounded, and the rest taken prisoners. Afterwards the raiders set fire to the barracks and took away the horses and equipments. Some private houses were also burned. Acts of violence were committed upon private citizens by the raiders; they kidnapped three individuals who finally escaped, and extorted small sums of money from women. It likewise appeared that they were bandits without uniform or flag and had

¹ Ornelas v. Ruiz, 161 U. S. (1896), 502; Moore, *Digest*, IV, 338-351.

only a red band on their hats. The Mexican government demanded the extradition of Ruiz, Duque and Guerra, who were among the members of the band, on charges of murder, also robbery and kidnapping. The commissioner committed them for extradition. The case was reviewed by Judge Maxey of the District Court of the United States for the Western District of Texas, reversing the decision of the commissioner on the ground that the offences with which they were charged were of a political character. On appeal to the Supreme Court, it was held that there being enough evidence before the commissioner to warrant his decision the district court erred in reviewing his judgment on *habeas corpus*. Although the question whether or not the offences charged were of a political nature was not decided in this case, the court made the observation that the raiders were "bandits" from which it may reasonably be inferred that the charges were common crimes. A warrant was then issued for the extradition of Ruiz and Duque (Guerra having escaped) by Mr. Olney who succeeded Mr. Gresham as Secretary of State. In the subsequent demand by the Mexican government for the extradition of Guerra, Mr. Sherman then Secretary of State, declined to surrender him on the ground that the assault was revolutionary in origin and that there was no evidence that he was guilty of crimes against private individuals. The net result of the case was that Ruiz and Duque were extradited while Guerra, who was a member of the same band, enjoyed the protection of the United States thereby escaping punishment.

THE CASE OF LYNCHHAUN

A somewhat different type of case is that of James Lynchehaun¹ which came up before Commissioner Moores in 1903 in Indianapolis. Lynchehaun was convicted in Ireland of the crime of assault with intent to murder his landlord and sentenced to penal servitude for life. After serving part of the sentence, he escaped and was finally apprehended in Indianapolis. It was proved that the landlord,

¹ *Irish-American Victory Over Great Britain*, Indianapolis, 1903, p. 112 et. seq.

who, in this case, was an English woman, was greatly hated by her tenants because of her maltreatment of them. Goaded by her misconduct, the rebellious tenants, among whom was Lynchehaun, decided to retaliate by giving her a sound thrashing. It was also proved that there was prevailing at the time a popular movement against landlordism and British rule in Ireland. It was held that the crime of which the defendant was convicted was political, it being incidental to the so-called agrarian movement to overthrow landlordism and eventually British power in Ireland. Declared Commissioner Moores:

It is evident to me that the assault on Mrs. McDonnell was incidental to, and a part of, a popular disturbance; that the popular disturbance, including the prisoner's part in it, had its origin and cause in a popular movement to overthrow landlordism and was done to further that movement, futile though it was, did disturb the political and social order of Ireland; that these people would have been in a state of open insurrection had not the right to bear arms been denied them; and, in fine, that the riot of October the sixth was for political purposes and that its participants were engaged in a partisan conflict whose object was a change of laws and upsetting of existing political conditions.

THE CASE OF RUDOWITZ

Following the revolution of the Baltic provinces of Russia in 1906 two Russian extradition cases came up in the United States. Rudowitz,¹ one of the fugitives, was charged with murder, arson, and robbery. The facts showed that a party of armed men entered the house of Christian Leshinsky and murdered him, his wife, and their married daughter. Then the men set fire to the building and robbed the daughter and her husband. There was no evidence that Rudowitz had any connection with the robbery; and it was shown that at the time of the commission of the alleged offences there was widespread revolution in the

1 Mr. Root, Secy. of State to Baron Rosen, Russian Ambassador, Jan. 26, 1909, Dept. of State file 16649/9 Serial No. 121; see also the opinion of John H. Wigmore on the Rudowitz case, *The Case of Jan Janoff Pouren* (Special edition), p. 118 et seq.; Hyde, *International Law*, I, 574-575, footnotes; editorial comment, *Am. Jour. Int. Law* III (1909), 459-461; E. Maxey, *Green Bag*, XXI, 147; Hyde, "Notes on the Extradition Treaties of the United States," *Am. Jour. Int. Law* VIII, 490-496. The writer had no access to the files of the State Department relative to the Rudowitz case and therefore had to depend upon the material used by Prof. Hyde in his book.

Baltic provinces, that the killing of the persons above mentioned and the burning of the house were voted upon by one of the groups of the "Social Democratic Party", and that Rudowitz participated in the deliberation of the party when the Leshinskys and their daughter were condemned to death for having betrayed the revolutionist to the authorities. Secretary Root held that these charges were political and refused to surrender the accused.

THE CASE OF POUREN

In the case of Pouren,¹ another Russian refugee, who was accused on practically the same charges, the same conclusion was reached by the committing magistrate. The accused was a member of a revolutionary party and took an active part during the revolution in Russia and the offences charged against him were committed by him under the directions of the leaders of the party. Commissioner Hitchcock held that the offences being incidental to the political disturbances existing at the time were of a political character.

IN RE FEDORENKO

In 1910 a Canadian court had occasion to examine the demand of the Russian government for the extradition of Savva Fedorenko,² accused of the murder of a village watchman in Russia named Osadchuk. The accused objected to his extradition on the ground that the offence was political. On the night of January 5, 1908, Fedorenko and his friend were guests of Volkodor in a Russian village. Upon being informed of the presence of these men, the village constable went with the deceased and other watchmen of the village to Volkodor's house to investigate. At first they were satisfied by the explanations of Volkodor as to the peaceful character of the accused. However, they finally decided to take the men to the village authorities for further investigation. The accused and his friend not only refused to go but shot the deceased and escaped. The com-

¹ *The Case of Jan Janoff Pouren* (Special edition), opinion of the United States Commissioner Hitchcock, delivered March 30, 1909.

² 20 Manitoba 221.

mitting magistrate held that the offence was not committed in furtherance of a political object. In an application for a writ of *habeas corpus* the court arrived at the same conclusion as the committing magistrate as to the nature of the offence, but discharged the prisoner for lack of proper requisition. Speaking of the Social Democratic Party, the committing magistrate said: "He belonged to the Social Democratic Party whose object was, not only to alter the form of government, but also the doing away with private ownership of property. A propaganda was carried on by them throughout the country and numerous revolutionary outrages were perpetrated by them." This decision harmonizes with the decisions of the Swiss Federal Tribunal in refusing asylum to members of the various revolutionary parties in Russia.

2. INTERPRETATION BY THE SWISS FEDERAL TRIBUNAL AND OTHER COURTS.

A comparison of British and American decisions with those of foreign tribunals, especially Switzerland which has been a favorite place of refuge for so-called political offenders, might not be altogether unprofitable. The experience of Switzerland in extradition matters is highly instructive because there extradition is handled by the Federal Tribunal, a practice directly opposite to that of France where extradition is purely an administrative affair, or to that of the United States where the practice is partly judicial and partly administrative.

THE CASE OF KOMPOWSKI

In a case decided by the Swiss Federal Tribunal in 1886, political motive was invoked by the accused as a ground in opposing his extradition.¹ The facts are extremely complicated. Russia demanded the extradition of Kompowski on the charges of malfeasance in office and forgery. Preobrajenski died intestate in St. Petersburg. Inasmuch as no claim was filed against his estate during the period prescribed by law, which in this case was ten years,

¹ *Entscheidungen des schweizerischen Bundesgerichtes*, XII, 120; Langhard *Das Schweizerische Auslieferungsrecht*, Bern, 1910, p. 50.

it should have escheated to the state. However, Kompowski who was an employee in charge of the administration of such estates fraudulently allowed the filing of the claim of Countess Grabowska, already barred by the statute of limitations. The claim was otherwise valid. The countess recovered 10,000 rubles which, it was alleged, was handed over to Kompowski. This was, however, denied by him. The accused contended that he and the countess belonged to the Nihilist Party; that he had been entrusted with the administration of her finances; and that his motive was to assure the recovery of said amount which the countess was ready to contribute to the cause of the party. He further contended that he had for some time made out lists of intestate inheritances to prevent them from escheating to the fiscus for the benefit of the party. The court overruled the objection and ordered his extradition.

THE CASE OF BELENZOW

In the *St. Albans Raid* and in the *Ezeta* case the court held that the robbery of a bank under the circumstances therein mentioned was a political offence. The same question came up before the Swiss Federal Tribunal thrice and only in one case was the extradition refused. The first of these cases concerned the extradition of Belenzow.¹ In 1906 Russia demanded from Switzerland his extradition on the charge of robbery with violence. At the investigation by the police 37,000 rubles were found in his possession. He declared that he and eighteen others entered a bank and forced the employees by means of threats to show them the vault. They got away with 875,000 rubles in bank notes and cash. The money was divided among them, Belenzow getting 43,000 rubles, 6000 of which were given away to various revolutionary organizations during his flight to Switzerland. He alleged that the robbery was planned three weeks before at a meeting of the revolutionary socialist party of Moscow of which he was a member because the party needed the money with which to finance its cam-

¹ *J. D. I. P.* XXXIV (1907), 888-891; *Entscheidungen des schweizerischen Bundesgerichtes*, XXX, part 1, 531; Langhard, *op. cit.*, pp. 58-60.

paign and to aid the victims of the revolution and the strikes. He objected to his extradition on the ground that the charge was of a political character. The court found that at the time of the robbery the revolution had long been suppressed and that the robbery was not decided upon by the revolutionary party itself but by a radical group within the party. It was also established that the Russian revolutionary party did not only disapprove of the deed but protested publicly against such a method. Considering all these circumstances, the tribunal decided that the offence was not political. The court declined to give a definition of political offences. Said the court:

However, in Swetzerland, the doctrine and the decisions have always avoided to define more exactly an offence of a political nature; and, in fact and by reason of the infinite variety of cases, it is not possible to ground this matter on some rigid principles than merely to trace, in a general way, the distinctive features of political offences; all depends on the particular circumstances of each case; the authority called upon to decide the case should decide according to the particular circumstances of each case whether or not an offence wears a political character.

The Court further observes:

Belenzow and his accomplices have robbed, not a State coffer or other public institution, but a private bank and they have thus injured the property of private persons of whom it has not been even alleged that they have, for example, taken part in favor of the State in the fight against it by the revolutionists, and who, on the contrary, were not concerned in the struggle.

Would the fact that the bank robbed is a private institution or that its board of directors sides with the government in its fight against the revolutionists affect the result of the case if the offence committed is otherwise political? The answer must be in the affirmative following the decisions in the *St. Albans Raid* and in the *Ezeta* case. It is difficult to see how the character of the property injured; that is, whether public or private, taken by itself, can affect the nature of the offence. Public treasuries, like private banks, are often subject of ordinary robbery.

THE CASE OF KERESSELIDZE AND MAGALOFF

In the Keresselidzé¹ case decided a year later by the Federal Tribunal, Russia demanded the extradition of three Georgians, the two Keresselidzé brothers and Magaloff, who had taken refuge in Switzerland, accused of participation in the robbery of the treasury of Douchety, near Tiflis. One of the contentions by counsel for the defense was that the robbery of the treasury was committed by the military organization of the Georgian Federalist Party for a revolutionary purpose and consequently the offence was political. The court held:

Thus, everything in the foregoing consideration is of such a nature as to warrant the conclusion that in the offence of which the Keresselidzé brothers and Magaloff are accused the political character is predominant, or, in other words, the elements of political nature absorb the other elements of common law or prevail over them. In effect, and as far as one may judge, the crime imputed to the accused has been decided, organized, prepared and executed in the midst of a revolutionary period by a political party aiming at the overthrow of the established political order, or by the military organization of this party; it has been committed to the prejudice of the state or of one of its institutions for the purpose of so weakening the governmental forces as to put into the hands of the said party (Georgian Socialist-Federalist) and of the population itself the arms destined to them to permit the continuation of the struggle for the conquest of their political and economic ideal; and lastly there is no indication that the organizers or the authors of the incriminated act would be actuated by personal motives.

It is difficult to reconcile this case with the other two robbery cases (Belenzow and Victor Gabrilow Wassilieff).

THE CASE OF VICTOR GABRILOW WASSILIEFF

Another case came up before the Federal Tribunal arising out of the disturbed condition of Russia in 1905. The Russian government demanded the extradition of Victor Gabrilow Wassilieff² accused of complicity in the

1 J. D. I. P. XXXIV (1907), 891-892; *Entscheidungen des schweizerischen Bundesgerichtes*, XXXIII, part 1, 169; Langhard, *op. cit.*, 60-61. Commenting on this case, Langhard declared: "The Federal Tribunal has accorded protection only in one case; this was to the brothers Keresselidzé and Nestor Magaloff. This was an error according to our opinion. If the extradition of the above mentioned fugitives who were wanted in Russia for robbing the Treasury of Douchety could not be conceded, at least their expulsion by the Federal Council would have been in order."

2 J.D.I.P. XXXVI (1910), 60 *et seq.*, (unpublished); Langhard, *op. cit.*, 66-69.

robbery of a bank in a certain town in Russia. It appeared that three young men armed with revolvers entered the bank and told the cashier and a client who happened to be there at the moment to hold up their hands. They then opened the vault and extracted the sum of 10,679 rubles. When they were about to leave, the accused, who was a clerk of the said bank, arrived at the scene. He requested the men to certify on the cash book the amount of money they had taken. One of them wrote on the book: "The sum of 10,679 rubles was taken.—Anarchists-Communists." Then the robbers disappeared. The conduct of the accused during the whole transaction aroused the suspicion of the authorities. It developed later that the robbers were recidivists and did not belong to any political party. One of them confessed the complicity of Wassilieff who gave the necessary information to facilitate the robbery and, by way of compensation, received 500 rubles. This was denied by the accused. His counsel set up the defense that the offence charged was of a political character. It was alleged that the accused was formerly a member of the Russian revolutionary socialist party and, upon its dissolution, joined the ranks of the anarchist-communist party; that at the time of the robbery the Caucasus region was a hot bed of revolution. It was further alleged that the robbery is an "expropriation", a means adopted by the communists in their fight against the government; and that though this means is exceptional it was justified by governmental atrocity. In support of his arguments he produced statements of communists organizations in and outside Russia affirming Wassilieff's affiliation with the communist party and setting forth the object of the party. The court held that the offence was not political. Said the court:

In the same manner as the Federal Tribunal has decided in the previous cases of Belenzow and Wassilieff (Victor Plan-tonovitch) it is also in the present case inspired by the same doctrine. The political character predominates over the element of common crime only when the crime was committed in pursuit of a purely political crime in the relation of close connexion with the aims of a party which attempts the modification of the social or political organization of the State. On the other hand, it is not sufficient that the crime includes a

certain political element, that is, that it attempts to realize the aims of any political party. Even this last condition is not met in the case before the court. Wassilieff has nowhere established as a fact that the robbery of the *Banque du Nord* was planned by a political group. We have not even the certainty of having to do with an act of terrorism emanating from a political organization. Even such a state of facts would, as is clear from our precedent considerations, not constitute a political crime. The unlawful appropriation of an amount of money, without any other definite aim, can, at best, claim only a very remote relation to the program of a political party whose aim is the annihilation of the State or the radical change of its political organization. Thus it is out of the question to attribute to such an act the character of a relative political crime.

The tribunal finds this case analogous to the Belenzow case. It distinguishes it from the Keresselidzé case in that at the time of the robbery the district was not in a state of open revolt whereas in the latter case a revolution was going on in Georgia as a consequence of which a state of siege had been ordered in many places. Moreover, in the case of Wassilieff the attack on the bank was not made in pursuance of the decision of a party, whereas in the Keresselidzé case it was planned and executed by the Georgian Socialist-Federalist party the object of which is disinterested. The observation of the court that even if the *Banque du Nord* was a public institution, the crime charged would not thereby constitute a political offence, contradicts its dictum in the Belenzow case.

THE CASE OF SILBERSTEIN

In 1911 the Russian government demanded from Switzerland the extradition of Silberstein¹ on a charge of embezzlement by forgery committed while he was a director of the local branch of the Union Bank at Lebedinsk. Silberstein's defense was that the crime of which he was accused was political in character inasmuch as the divers sums of money alleged to have been embezzled by him were sent to the revolutionary committee in Russia. He introduced, however, no evidence in support of his assertion merely contending that it was not incumbent upon him to prove the political character of the act but that the prosecution must prove that the money alleged to have been embezzled

¹ J. D. I. P., XL (1913), 673-682.

by him was used for his personal benefit. The Federal Tribunal ruled out this contention of Silberstein holding that the burden of proof is upon the accused to show that the crime is political in character. According to the court the accused must bring forward such facts from which the political aim may be inferred. For instance, it would have been essential to know particularly the name of the party to which the fund had been remitted and its program regarding the overthrow of the political and social institutions in Russia. It is not necessary, the court further added, for the accused to introduce complete proof of these facts but only such facts as would "put the committing magistrate in a position that he could form himself a well-founded opinion by indicating concrete facts... about the nature of the delictual act, or about the elements which are indispensable to allow him to form an opinion". In the present case not only was proof of the political nature of the act wanting but upon the arrest of the accused a portion of the embezzled money was found in his possession.

THE CASE OF KILATSCHITSKY

In *re Ezeta* and in the Russian refugee cases it was decided that the killing of a spy during the progress of a revolution is a political offence. Would the mere fact that the killing is the execution of a death sentence voted by a political party be sufficient to give the act a political color as to take it out from the category of extraditable offences? The Federal Tribunal answered it in the negative. In the Kilatschitsky case¹ the Russian government demanded the surrender of the accused on the charge of complicity in the assassination of Ivanoff, Director of the Vistula Railroad. The death sentence was pronounced by the revolutionary socialist party as a penalty for the refusal of the deceased to take back the discharged workmen. The accused admitted the charge but pleaded its political character. He alleged that the deceased as Director of the Vistula Railroad Russianized the service and acted as police agent for the

¹ *J. D. I. P.*, XXXV (1908), 259-260; *Entscheidungen des schweizerischen Bundesgerichtes*, XXXIII, part 1, 403; Langhard, *op. cit.*, 61-62.

government; that he appointed police spies and *agents provocateurs* to positions in the railroad service; and that at his instance many employees had been arrested and exiled into Siberia. He further alleged that during the general strike in Russia in 1905 in which the employees of the Vistula Railroad joined, Ivanoff ordered the discharge and arrest of numerous employees of the road. When the strike was over, the deceased refused to reappoint the discharged employees which refusal brought forth the death resolution. It was held that the offence was not political as it had a very remote connection with the purpose of the party. The fact that the crime had been committed in the execution of a verdict of the terrorist party was not sufficient to give the act a political character. This is especially true in this case as the offence was committed not in the course of a revolutionary outbreak but after a strike and as a penalty for the refusal of the deceased to reemploy the strikers. The act according to the court was inspired rather by revenge and terrorism.

The decision in the Kilatschitsky case does not seem to be in harmony with the decision in the Lynchehaun case, *supra*, notwithstanding their close analogy. Both cases arose out of economic dissatisfaction. In the Lynchehaun case it was decided that the crime of "assault with intent to murder" was political because of its connection with the larger movement against landlordism and British rule in Ireland. In both cases at the time of the commission of the offence the country was not in open revolt. In the Kilatschitsky case, the Federal Tribunal, however, rejected the plea of the political character of the offence notwithstanding the more intimate connection of the general strike with the revolution of 1905 and the official position which the deceased held. The court has consistently refused to attribute political character to isolated cases of murder committed by the so-called terrorist party in Russia.

THE CASE OF VICTOR PLATONOVITCH WASSILIEFF

In the more notorious case of Victor Platonovitch Was-

silieff,¹ decided by the Federal Tribunal in 1908, Russia demanded the extradition of the accused for the murder of Kandaourow, chief of police of Pensa. The murder was accomplished in pursuance of a decision to that effect by the revolutionary socialist party. This action was prompted by the alleged brutality of the said chief of police. It was alleged by Wassilieff that he did not even know Kandaourow and that personally he entertained no ill-feeling against him. Wassilieff objected to his extradition on the ground that the offence charged was political. In support of this argument it was alleged that the Russian revolutionary socialist party was then aiming at the overthrow of the then autocratic regime and the substitution in its stead of a popular government and if the party resorted to terrorism it was but an act of legitimate self-defense. It was also contended that the manifesto of 1905 granting certain concessions, wrung from the Czar, was blocked by the conservative and official elements; that the death sentence was prompted by the atrocities committed by the said chief of police; and that the Russian government itself recognized the political character of the offence by causing the accused to be tried by a military court. It was held that the offence was not political and the extradition of Wassilieff was ordered subject to certain conditions. The tribunal laid down the rule that in order that an offence may have a relative political character which would warrant refusal of extradition it must be committed "for the purpose of preparing or to assure the success of a pure political offence, that is to say, of a criminal act directed against the political or social organization of the State." It is also necessary that there should exist a direct relation between the crime committed and the end sought by a party and the burden is upon the accused to prove this connection. Finally, even if the end sought by a party is political, in the narrow

1 J. D. I. P., XXXVI (1909), 281-302; the case is reported in French and German, *Entscheidungen des schweizerischen Bundesgerichtes*, XXXIV, part 1,533; Langhard, *op. cit.* pp. 62-65; *Annual Bulletin Comparative Law Bureau of the American Bar Association*, 1909, 162-164; an English translation of portion of the decision is found in *For. Rel.* (1909), 519-521; comments thereon of Julian W. Mack, *Proceedings*, Am. Soc. Int. Law, III, 152.

sense of the term, "the common-law element may nevertheless still predominate over the political character of the crime, by reason of the atrocity of the means employed to attain the end sought."

There is a striking analogy between the Wassilieff (Victor Platonovitch) case and the Russian refugee cases decided by American courts. As a matter of fact, they all arose out of the political and social disturbances in Russia in 1905. The only distinction is that in the Russian refugee cases it was private citizens who were murdered as spies while in the Wassilieff case it was a chief of police who was put to death. In both cases the death penalty had been decreed by the revolutionists. If murder was good enough for private citizens who were suspected as spies, might not a government official who was the very instrument of oppression deserve it more? It perhaps may be true that, as the court found, there was no sufficient evidence to sustain the general charges against Kandaourow, but the specific charge that he ordered the Cossacks to charge upon a crowd making a pacific demonstration concerning the manifesto of the Czar in which a girl was killed was fully established. Even if these charges were proved, the court said, the murder of the chief of police would remain a common crime just the same. Following the Kilatschitsky case, the court further held that it was not incumbent upon a political party to sentence to death its enemies and consequently the execution of that sentence would not give the act a political character. It is difficult to reconcile this decision with those in the Russian refugee cases decided by the United States courts.

THE CASE OF SAVARKAR

A peculiar case was decided by arbitration in 1911 involving the question whether or not Savarkar,¹ a Hindu

¹ Wilson, *The Hague Arbitration Cases*, p. 230; J. B. Scott, *The Hague Court Reports*, p. 276; *Am. Jour. Int. Law*, V, 520; *ibid.*, editorial comment, 208; criticism of the award, *Law Magazine and Review*, XXXVI, 5th s. (1910-1911); *J. D. I. P.*, XXXVIII (1911), 156 *et seq.*, 626; "The Right of Asylum", *The Law Journal*, vol. 45 (1910), 652; Bentwich, *Students Leading Cases and Statutes on International Law*, London, 1913, 109.

revolutionary who had escaped from the *Morea* while that vessel was in the French port of Marseilles, should be restored by Great Britain to the French republic. Savarkar was being sent to India to stand trial for abetment of murder. While the vessel was at Marseilles, he managed to escape, swam ashore and started to run. He was captured by a French police officer who handed him over to the British agents. The evidence showed that the British and French police authorities had had a previous understanding that the latter would take the necessary precaution to prevent revolutionary Hindus then in France from attempting a rescue of the prisoner. The award of the tribunal was in favor of Great Britain. It decided that, while irregularity existed in the arrest of Savarkar, there is no rule of international law by which Great Britain was obliged to restore the prisoner to France because of the mistake of the French police officer in delivering him up to the British authorities. While the decision was confined only to the *compromis*, that is whether the irregular recovery of Savarkar constituted a violation of the sovereignty of France, there is a strong suggestion that the fact that the prisoner might have been a political offender would not alter the result of the case.

THE CASE OF CHIMANSKY

The decision of the Court of Appeals of Brussels in the case of Chimansky¹ does not sufficiently state the facts. From the note, however, of P. Leboucq, *Sous-chef de Bureau (affaires criminelles) au Ministère de la Justice* of the Belgian government, it appears that Chimansky was claimed by the Russian government for murder. At the time the act was committed Russian Poland was in the throes of a revolution which was marked with extreme cruelty on both sides. In its effort to suppress the revolt, the Russian government incited the lowest class of the population to pillage and massacre. In reprisal, the revolutionists put to death all suspected spies and agitators in the employ of the Russian government. The victim in this particular case was an alleged spy in the service of the Russian government and

¹ *J. D. I. P.* XL (1918), 232.

a barber by profession. The court refused the demand of the Russian government for the surrender of Chimansky, holding that in view of the circumstances, the crime imputed to him was of a political character being inspired by revolutionary motives. The court observed that in deciding the case it had to take into account the situation in Russian Poland and could not isolate the deed from the events surrounding its commission.

THE CASE OF RAGNI

As a consequence of the upheaval which marked the rise of Fascism in Italy, the Federal Tribunal had occasion to pass upon a demand made by the Italian government upon the government of Switzerland for the surrender of Ragni¹ who was sentenced by an Italian court to nine years imprisonment for the crime of "incidental complicity in the assault with intent to kill" certain Italian officials. The facts are related by the court. A band of Fascists visited Cagli in the interest of Fascist propaganda. Because of the insolent behavior of the members of the band, their visit ended in a brawl with the socialists, the communists, and the populists as a result of which two members of the band and several onlookers were injured. The incident so incensed the Fascists that they wanted to take revenge for the injuries two of them had suffered. On the advice of friends, however, they left the place. As they drove along the highway on their return trip, they fired at several places claiming that they did it in order to frighten the populace who were making hostile demonstrations. In one of these places a man was shot which incapacitated him for some time. The report that several persons were wounded by the Fascists had so aroused the radicals in Cagli that the latter betook themselves in front of the custom house where Liberati, the superintendent of the custom house, and his clerk Arcangeletti found themselves. These two men belonged to the Fascist party. They were attacked by the mob who stoned the building and set fire thereto. Liberati and Arcangeletti dashed out of the building, re-

¹ *J.D.I.P.*, LI (1924), 520.

volver in hand, to save their lives but were beaten and overpowered by a superior force.

As a result of this incident, Ragni, one of the participants, was convicted *in contumaciam* by the court of Pesaro of participation in an attempt to kill Liberati and Arcangeletti and his extradition was demanded by the Italian government from Switzerland. Ragni interposed the objection that the crime of which he was convicted was political in nature for which reason his surrender should be denied. The Federal Tribunal upheld Ragni's objection, stating that the incident was not an ordinary street fight caused by personal motives but part of a general struggle in Italy between the Fascist party and the opposing parties for control of the government, not dissimilar from a civil war. The evidence disclosed further that immediately after the Fascist party had come into power an amnesty proclamation was issued by the government extending clemency to all persons convicted of certain offences under the laws of Italy committed in the course of political movements where the acts were done with a direct or indirect national aim. In issuing the proclamation the Italian government admitted that the country was in the midst of a great politico-social upheaval. The proclamation was intended only for the benefit of Fascist offenders, excluding persons belonging to the opposing factions who were seeking to subvert the politico-social organization set up by the Fascists on the ground that the state cannot give up the right of self-defense. As regards this point, the Federal Tribunal observed that while such discriminatory treatment might be justified for motives of internal policy, the committing magistrate should deal equally with the victors and the vanquished. As a matter of fact, the court declared further, this very discrimination is an additional argument in favor of Ragni's objection that the crime of which he was convicted was of a political character .

THE PILCOMAYO

How large must the size of the attacking force be in order to raise the offences committed in the course of the

struggle to the dignity of political offences? Would the fact that the offence is committed during a political riot be enough to take it out of the operation of extradition treaties? May half a dozen or a dozen men raise the revolutionary standard and be free from the consequences of their acts on the plea that they wear a political character? Where then is the line going to be drawn? From the decisions in the Mexican revolutionists and the Cazo cases it may be inferred that the attacking party does not have to be of any considerable size. In the Castioni case the uprising was only confined to the canton of Ticino. In a case decided by the Argentine Supreme Court in 1891 the offence was the result of a mutiny which broke out aboard the Chilean gunboat the *Pilcomayo*¹ in which several members of the crew were killed and wounded. The mutineers were detained by the local authorities at the request of the Chilean minister. They then applied for a writ of *habeas corpus* which was granted, the Federal Judge holding that Chile had lost jurisdiction over the mutineers by causing them to be removed from the boat and placed under the custody of the Argentine authorities. On appeal the Argentine Supreme Court sustained the ruling of the lower court holding that:

A mutiny breaking out for political reasons among the crew of a war vessel anchored in territorial waters of the Republic is to be considered as a political offence, and does not lose that character by infractions of another kind connected therewith, committed as a means to reach that end.

Where mutineers are brought on shore and are delivered over as prisoners to the authorities of the country, in consequence of the inability to retain them on board, their return to the representative of their Government after they have petitioned for a writ of *habeas corpus* cannot be granted without transgressing the law, which renders those guilty of political offences inviolable; it infringes also the principles of public international law which does not allow the delivery of prisoners of war, whether public or insurrectionary, who have in whatever way it may be set foot in the soil of a neutral State.

At the time the mutiny broke out a revolution was

¹ *Fallos de la Suprema Corte de la Republica Argentina*, 1893, XLIII, 321-332; Mr. Buchanan, Minister to the Argentine Republic, to Mr. Hay, Secretary of State, No. 584, Dec. 1, 1898, 37 MS. Desp. from Arg. Rep., enclosing a report of Mr. Francois S. Jones, Sec. of legation, citing the case of the *Pilcomayo*; Moore, *Digest*, IV, 351-352.

going on in Chile and the crew of the *Pilcomayo* appeared to be divided on the issue.

THE CASE OF KÖSTER

Is a revolution a condition *sine qua non* to the existence of a political offence? The decisions of the British and American courts would seem to incline to this view. However, according to a few foreign decisions, a political offence may be committed even in the absence of a revolution. This type of cases is rare. In a case decided by the Swiss Federal Tribunal Germany demanded the surrender of Köster¹ for the crime of having abetted and incited perjury. The facts of the case are as follows: On May 3, 1891, Köster made arrangements for a social-democratic May festival in the inn of one Karl Hoppe. Finding the hall decorated with Prussian and German flags and also with the busts of the emperors William I, Frederic III and William II, it was alleged that he made the remark: "*Der krempel muss'raus*" (That junk must be removed), pointing at the flags and the busts. For this remark he was prosecuted and sentenced by the *Landgericht* of Magdeburg to one month's imprisonment for the crime of *lese-majesté*. At the trial it was alleged by the prosecution that the accused induced Hoppe to testify falsely in his favor. Hoppe later admitted his perjury but claimed that he had been intimidated by Köster. The accused fled to Switzerland. The Federal Tribunal held that the offence charged was political and refused the demand for his surrender. Perjury and instigation of perjury, said the court, are *per se* extraditable offences. In this case, however, the crime of which Köster was accused was so connected with the crime of *lese-majesté*, a political offence, that it should be regarded as a relative political crime, its commission being prompted by a desire to escape punishment for *lese-majesté*.

THE CASE OF PELISSIER

In 1905 the French government demanded the sur-

¹ J. D. I. P., XX (1893), 635-636; *Entscheidungen des schweizerischen Bundesgerichtes*, XIX, 122; Langhard, *op. cit.*, pp. 52-53.

render af Pelissier,¹ a French deserter, who stole certain military secrets and sold them to a foreign country. He was, therefore, guilty of desertion, high treason, and theft. His extradition was granted after he had served the sentence imposed upon him by a Belgian court for blackmailing and assuming a false name, on condition that he would be tried only for the crime of theft. Here is an act involving two offences, theft and treason, the one a common law offence, the other political. It is idle to pretend in this case that theft can be separated from treason. This decision has been justly criticized. "In reality, the crime imputed to him consisted precisely of having obtained illegal possession of confidential documents in order to deliver them to a foreign country. Without theft there is no treason. Now to say that there exists no indivisibility between the two facts amounts to a denial of the evidence."²

THE CASE OF POZZI

In the case of Pozzi,³ the Austrian government arrived at opposite conclusion upon a similar statement of facts. Italy demanded the surrender of Pozzi who was accused of theft. Pozzi, an Italian seaman, stole the plan of the defences of the city of Venice and tried to sell it to a foreign country. The act constituted theft and treason at the same time. Austria refused to surrender him on the ground that the offence was political in spite of Italy's promise to try him only for the crime of theft.

THE CASE OF STEPHANY

In an interesting case decided by the Federal Tribunal of Switzerland, Germany made two separate demands for the extradition of Stephany,⁴ a former police commissioner of Alsace-Lorraine. In the first demand he was accused of substruction of public documents as a public official and in the second with simple substruction. The facts are as

1 *J. D. I. P.* XXXIII (1906), 936.

2 For criticism of the decision, see *J. D. I. P.*, XXXIII, 1331-1332.

3 *J.D.I.P.* (1905), 1174; Laire, *L'extradition et les délits politiques*, p. 231.

4 The case is discussed in Saint-Aubin, *op. cit.*, I, 419-420; Langhard, *Das Schweizerische Auslieferungsrecht*, pp. 57-58; *Le Petit Temps* for April 29, 1906; *Entscheidungen des schweizerischen Bundesgerichtes*, XXXII, part 1, 317.

follows: While the accused was commissioner of police in Alsace-Lorraine, he demanded from B information concerning M leader of the liberal party in his locality. B wrote him two letters in which he made grave charges against his political rival. Later on Stephany offered to sell the letters to M for 300 marks. The offer having been turned down by M, it was agreed that M would have the letters on a loan of 150 marks to the accused. M then brought an action for libel against B. This led to the investigation of Stephany by the authorities. The accused claimed that these letters belonged to his private correspondence so that he could dispose of them as he pleased. In this connection it should be stated that the accused had published a brochure under the title, "Germanization, Despotism and Police Administration in Alsace-Lorraine" (*Germanisation, Willkürherrschaft und Polizeiregierung in Elsass-Lothringen*) and had contributed numerous editorial articles to the *Strassburger Bürgerzeitung* in which the government of Alsace-Lorraine was severely criticized. Stephany protested against his extradition on the ground that the demand for his surrender was inspired by the desire of the German government to wreak vengeance on him. In the pamphlet referred to above no mention was made of the Dr. Bastian-Mary episode. Following the opinion of the *Bundesanwaltschaft*, the court granted his extradition under the first mentioned charge, holding that it was pure malfeasance in office and that there was no connection between it and the publication of the political tract.

3. INTERPRETATION BY THE PHILIPPINE SUPREME COURT

Following the Filipino insurrection against the United States, numerous cases came up before the Philippine Supreme Court involving the interpretation of the amnesty proclamation issued by the President of the United States on July 4, 1902. These cases did not of course involve extradition but it is interesting to observe the views of the local court concerning political offences as indicative of the probable line of action the insular authorities would take

should they be called upon to pass upon this question.

By the aforecited proclamation amnesty was granted "to all persons in the Philippine Archipelago who have participated in the insurrections aforesaid (against Spain and the United States) or who have given aid and comfort to persons participating in said insurrections for the offences of treason or sedition and for all offences political in their character committed in the course of such insurrections pursuant to orders issued by the civil or military insurrectionary authorities or which grew out of internal political feuds or dissensions between Filipinos and Spaniards, or the Spanish authorities, or which resulted from internal political feuds or dissensions among the Filipinos themselves during either of said insurrections."

A question might be raised as to whether the proclamation by its peculiar phraseology is meant to embrace other crimes than those ordinarily regarded as political in international law. In *United States v. Vergara*,⁴ the Supreme Court interpreted the proclamation as to include (1) purely political crimes such as sedition and treason, (2) common crimes political in their character, and (3) crimes which have their origin in internal political feuds or dissensions among the Filipinos.

Does the third class of offences extend the meaning of political offences beyond its generally accepted interpretation? In *United States v. Luzon*,² the Supreme Court laid down the doctrine that in order to entitle an offender to the benefits of the proclamation two essential elements must be present: (1) it must appear that he participated in the insurrection against Spain or the United States, and (2) that the crime with which he is charged must be of a political character. "Common Crimes," said the court, "such as murder and robbery, are not included in the amnesty unless they were committed under circumstances which clothe them with a political character." The court had always denied to extend the benefits of the amnesty proclamation in

1 1 P. R. 638.

2 2 P. R. 381.

those cases where the "feuds" or "dissensions" did not grow out of the insurrections against Spain or the United States even though the offender might have participated in either of said insurrections. The offence must be the outcome of a "political", not of a private, feud or dissension. The term "political" has been construed by the court in *United States v. Bundal*,¹ in a large sense; that is to say, the act must be directed against the sovereignty of Spain or the United States in order to qualify it as a political offence. In that case it was decided that the killing of a municipal president as a result of a local uprising instigated by a group of townspeople for the purpose of getting rid of an abusive official is not an offence of a political character in the sense of the proclamation though the court admitted it had some political tinge in it. Apart from the desire on the part of the defendants to avenge themselves upon their victim, no other personal motive was present as no robbery of the property of either of the victim or of the municipality took place in spite of the fact that the defendants could have easily done so as they were in complete control of the town for some time.

In *United States v. Pajarillo*,² there was a similar attempt to overthrow the locally constituted authority by a band of insurgents, headed by Pajarillo, because of the alleged betrayal of the cause of the revolution by the town officials who received their commission from the revolutionary government when they decided to surrender to the American forces. During the attack, Pajarillo in company with a few others, mostly his relatives, went to the house of the deceased and commanded him to come out. This the latter refused to do as a result of which the defendant shot and killed the deceased. It was held that an attempt to seize control of the municipal government established by the revolutionary government is covered by the proclamation, it being the result of "political feuds or dissensions among the Filipinos". Pajarillo was convicted, however, for the circumstances of the killing did not reveal the remotest con-

¹ 3 P. R. 89.

² 19 P. R. 232.

nection with the movement. On the other hand, there was strong evidence that the crime was prompted by personal motive. The court justly observed that it could discover no reason for the adoption of extreme measure in the case of the deceased while the other officials escaped injury. Said the court: "The evidence tends to disclose, if it does not conclusively establish, the fact that the leader of that party was the paramour of the wife of the victim of the tragedy. It is fair to assume the enmity of the man he had wronged in the discovery of his relations. In any event the personal motive stands out strongly from the pages of the record, and nothing that is contained therein justifies the conclusion that it was induced by the demand of political necessity or expediency."

The Pajarillo case may be distinguished from the Bundal case in that Pajarillo was admittedly an insurgent officer while Bundal never took part in the insurrection against Spain or the United States. In the Pajarillo case the movement was directed against the local revolutionary government, whereas in the Bundal case the movement was directed more against the deceased than against the political organization which he represented.¹ Finally, the treachery and brutality with which the deceased had been disposed of by his enemies tipped the scale of justice against giving the offence a political character.

In *United States v. Garcia*,² the court has restricted the application of the proclamation to Filipinos. In that case the court refused to extend the benefits of the amnesty to a municipal captain (now called municipal president or mayor), who, in repelling an attack made by a large force

¹ Compare the dissenting opinion of McDonough, J.: "The object of the uprising and the killing of the president as shown in this case was of a political nature. He had been in office about twenty years, and held over after Spanish power had been swept away. The people of the town were divided into two parties, one apparently supporting the president and his policy, the other against him, claiming that he had oppressed and wronged the people. The motive of the accused was not robbery or personal revenge, but rather to rid the people of an obnoxious official—for during several days after his death they guarded the treasure of the town and the house of the deceased, finally turning them over intact and without injury." 3 P. R. 102.

² 1 P. R. 324.

of insurgents upon a town, succeeded in capturing two of the latter whom he caused to be executed after a trial by a court martial. The decision in this case was based upon the fact that the amnesty was intended only for Filipinos, excluding Spaniards. Through Garcia was a Filipino he was an official of the Spanish government when the incident occurred. The determination of the nature of the offence was not involved in this case. There is no doubt, however, that, from the point of view of international law, the offence was of a political character. As already stated, the denial of amnesty in this case was due to the fact that the defendant did not belong to the class of persons contemplated by the amnesty proclamation.

The court had refused amnesty in all cases where personal motive was the chief inducement for the commission of the crime regardless of any connection the offender might have had with the revolution.¹ The mere fact that the offence was committed during the insurrection does not warrant the presumption that it is of a political character²; nor the fact that the victims were Spaniards when the evidence showed that the offenders did not participate in the insurrection against Spain or the United States and that it was committed in furtherance of that movement.³

The Supreme Court has held in a number of decisions that the killing of suspected spies or persons who favored American sovereignty is a political offence. Some of these cases are reviewed here briefly.

In the Carmona case⁴ the defendant was a captain of the insurgent forces. He gave orders to his soldiers to waylay and arrest a suspected spy. As the deceased passed by, after a short conversation with his assailants, the latter

1 U. S. v. Correa et al., 1 P. R. 549; U. S. v. Luzon, 2 P. R. 380; U. S. v. Pascua, 1 P. R. 631; U. S. v. Abelinda, 1 P. R. 568; U. S. v. Mabilangan, 2 P. R. 397; U. S. v. Cajayon et al., 2 P. R. 570; U. S. v. Correa, 3 P. R. 87; U. S. v. Vizquera et al., 4 P. R. 380; U. S. v. Lastimosa, 27 P. R. 432.

2 U. S. v. Luzon, 2 P. R. 380.

3 U. S. v. Abelinda, 1 P. R. 568.

4 1 P. R. 326.

stabbed him to death leaving his body in the middle of the road.

In the Villamor case,¹ the defendant was secretary of a council of war that sentenced to death the deceased for "being a traitor to his country". The trial was conducted according to the regulations issued by the revolutionary authorities.

In *United States v. Monton et al.*,² a suspected spy was captured by the insurgents. He was tried by a council of war and found guilty of the charge. He was then taken to a forest nearby and there decapitated. The participation of the defendants consisted in executing the order of the war council.

In the case of *United States v. Santillan et al.*,³ the defendant served as judge advocate of a war council summoned by the revolutionists to try the deceased on charges of being "a spy and guide of the Americans." The order of the war council was to arrest him for trial before it and to kill him in case of resistance. The deceased "was attacked and killed without warning" by those in charge with the execution of the order. A few days afterwards his head was found suspended from a bridge wrapped in a piece of cloth with these words written thereon, "Juan Carballo, a bad man for the revolution."

In *United States v. Mercado de Guzman*,⁴ the defendant was a captain of the insurgent forces. On a certain occasion a man was brought before the defendant charged with being a spy of the Spaniards. The defendant interrogated the deceased as to the truth of the charge to which the latter replied in the affirmative. Whereupon Guzman insulted and abused the deceased and finally gave orders to his soldiers to kill him.

In the Vergara case,⁵ the defendant while he was pre-

1 1 P. R. 345.

2 1 P. R. 363.

3 1 P. R. 473.

4 1 P. R. 475.

5 1 P. R. 638.

sident of a certain town in March, 1900, put to death two persons whom he suspected as spies of the Americans. The motive for the killing was "solely because they favored the Americans or had rendered services to the American Army."

In *United States v. Repollo et al.*,¹ the defendants, who claimed to be *katipuneros* (members of the revolutionary organization called *Katipunan*), "went to the house of the deceased, commanded him to come down stairs, and manacled and carried him off". His body was found afterwards near his house in a mutilated condition. The defendants and the deceased were neighbors and no ill-feeling existed between them. The court held that there was a strong probability "that the motive for the killing was of a political character, and resulted from internal political feuds or dissensions among the Filipinos during the insurrection."

In the *Daligdig* case,² the defendant was a revolutionary captain who ordered the execution of two men who were believed to be spies. He caused the corpses to be exposed for several days with placards attached thereto containing this inscription, "Traitor to the country". No other motive impelled the defendant to kill the deceased.

In *United States v. Pacheco et al.*,³ two suspected spies were put to death by the defendants both of whom were revolutionists. The only reason for the killing was that the victims were selling English dictionaries which fact led their assailants to believe that they were spies of the Americans. The records showed no other motive prompted the commission of the crime.

In the *Pagaduan* case,⁴ the defendants were accused of the murder of certain Chinamen who were suspected as spies. The incident occurred in 1899 in the territory under the control of the defunct Philippine Republic. The in-

1 2 P. R. 195; see also *United States v. Candido Repollo*, 2 P. R. 227.

2 2 P. R. 343.

3 2 P. R. 345.

4 37 P. R. 90.

formation was not filed until after seventeen years had elapsed, which fact led the court to question the motive of the prosecution. The facts are briefly these: General Luna issued a circular ordering the execution of all Chinese spies. Acting upon this circular, the houses of certain Chinamen were raided and the inmates spirited away and shot. When this incident came to the knowledge of General Aguinado, he ordered an investigation of the same. The investigator found that the deceased Chinamen had frequently transmitted information about the movements of the revolutionary forces to the American army.

In all these spy cases the court has held that it is not necessary for the defense to prove that the victims were in fact spies. It is sufficient if it appears that the offenders, in committing the deed, were actuated by a sincere belief that they were advancing the cause of the insurrection though this belief might be erroneous.

A somewhat different situation is presented in *United States v. Lardizabal*¹. In that case the defendant was convicted in the lower court of the murder of an American soldier captured by the insurgent forces under his command. The defense was that the deceased was impeding the retreat of the revolutionists in view of his weak physical condition, and as he could not be safely abandoned to the American forces that were in pursuit of the insurgents without endangering the latter, the defendant was compelled to order his execution. In holding that the offence comes within the scope of the amnesty, the court said: "It was an act which, while from the standpoint of military law might be regarded as one of cruelty, was at the same time depending absolutely upon the discretion of the officer in charge of a command for securing the safety of the troops under his control and constitutes no other offence than that of sedition, within which term the war itself is included by the letter and spirit of the proclamation."

In the case of *Guzman et al.*,² a crime of unusual atrocity was committed upon the person of Pierra, a lieutenant

¹ 1 P. R. 729; see also *U. S. v. David*, 3 P. R. 128.

² 1 P. R. 385.

of the Spanish army. The manner by which this unfortunate officer met his death is tersely described by the court: "As soon as Lieut. Salvador Pierra arrived at the house in which Major Villa resided, the latter and the accused, Isidoro and Jose Guzman, beat and kicked Pierra, clubbed him with their guns, and then, having tied his arms behind his back, hung him from the roof of the parochial residence, letting him fall to the ground from time to time until he died." The murder was instigated by the Guzman family who hated the deceased because of the part played by the latter as judge in a military prosecution instituted by the Spanish military authorities against a member of the Guzman family.

In the Lardizabal and Guzman cases the court has decided that the execution of a prisoner of war, though it constitutes a violation of the laws of war, is a political offence. These decisions are not on all fours with the recommendation of the Institute of International Law to the effect that acts in violation of the laws of war should be treated as common offences. Both cases involved cold-blooded murder. In the Lardizabal case the law of self-preservation was urged upon the court in justification of the act. In the Guzman case military expediency was wholly absent. Personal hatred was the moving cause of the murder. This hatred arose out of the alleged participation of Pierra in the trial of a member of the Guzman family. The circumstances of this trial are not mentioned in detail in the decision. There was an indication that Guzman had been the object of a harsh treatment at the hands of Pierra by the words he addressed to the body of the victim, such as, "When the Bastille fell, the day arrived for the settlement of accounts", "Now you will give me satisfaction", and "Now we are even". If such be the case, the murder might be regarded as a reprisal in spite of its heinous character.

Though robbery is ordinarily a common crime it may be committed under circumstances as to invest it with a political character. A party of insurgents put to death an entire family on suspicion that the latter were spies of the Americans and also robbed them of their property. The

court held that the robbery is a political offence as it should be regarded as a reprisal upon the property of the enemy.¹ This doctrine was followed in *United States v. Pagaduan*, *supra*, where the insurgents looted the house of certain Chinamen on the alleged ground that the latter were giving information about the movement of the insurgent forces to the Americans. Reprisal as a criterion for determining the nature of subsidiary offences committed in the course of grave social and political disturbances is too broad and, if applied without further inquiry into the author's motive would, more frequently than not, shield the most hideous crimes from punishment. The court took a better view in *U. S. v. Giron*² where a band of insurgents by order of the captain, who, in turn, received orders from his superior officer, took forcible possession of a horse belonging to a private citizen. There was some evidence that the horse was requisitioned for military purposes. It was held that the offence was political. The same criterion was adopted in *United States v. Orduña*³ where in the course of a raid upon a town the insurgents took divers sum of money and other personal property from the townspeople as forced contribution to the revolutionary funds. The court said: "There is evidence in the record which at least tends to prove that some, if not all, of the property seized during the raid was ostensibly intended for the use and support of the soldiers and other adherents of the revolutionary government."

A new complication to the problem of political asylum is suggested in the *habeas corpus* proceedings instituted in the Court of First Instance of the City of Manila for the release of the person of Tan Malacca who was taken into custody by the Constabulary pending investigation against him ordered by the Governor-General with a view to his deportation. The petitioner was a native of Java and a Dutch subject. He was a leader of the nationalist movement in Java. To escape persecution by the Dutch authorities, he came to the Philippines under a false name. His

1 *U. S. v. Alhambra*, 2 P. R. 80.

2 5 P. R. 257.

3 21 P. R. 453.

presence was afterwards discovered by the authorities. The charge brought against him was that he violated the immigration laws by entering the islands surreptitiously. One of the contentions of the counsel for the petitioner was that the latter was a political refugee and as such he was entitled to asylum. In disposing of this argument the court said: "The plaintiffs have insinuated in the oral argument at the trial that Tan Malacca is a political refugee and therefore ought not to be expelled from the country in order to deliver him up to his persecutors; but the fact is that no evidence has been introduced to prove that fact. Besides, even if it were established, such an argument would be at all events inopportune and besides the point because it is not a question of surrendering him to the country that is prosecuting him but simply of deporting him from the islands because he entered the same in violation of the immigrations laws. On the other hand, it is not this court that is called upon to decide in the first instance whether or not Tan Malacca should be deported but the Collector of Customs." This case did not reach the Supreme Court. The foregoing decision strongly suggests that even a political refugee must enter the asylum state through the prescribed channel. In other words, the right of asylum does not extend to such political refugees as have violated the immigration laws.

The Philippine decisions can not, of course, be taken as authoritative. The Supreme Court has inclined to a too liberal interpretation of the amnesty proclamation. Indeed, as was said in a case, "the court has never stopped to inquire to what degree particular leaders of the various insurrectionary movements may have been impelled by the lust of personal aggrandizement and political advancement, nor has it sought to discover the reason for the 'internal dissensions among the Filipinos'... provided it affirmatively appears such feuds or dissensions could fairly be characterized as political."

Perhaps it is unfair to assume that the Supreme Court would adopt a similar attitude in extradition proceedings, for, in construing the amnesty proclamation, it has been largely guided by the purpose for which it was promulgated,—the reconciliation of Filipinos to American sovereignty.

B. ANARCHISTIC CRIMES**THE CASE OF ANDRADE**

In almost all modern extradition treaties with the exception of those concluded by England, Switzerland, and Italy provisions are made for the surrender of murderers of heads of states on the theory that they are *hostes humani generis*. The history of the so-called *attentat* clause is told elsewhere. Because dynamite and the dagger are usually the weapons employed by anarchists, we have got the notion that all murderers of heads of states are anarchists, which is not always true. In the famous assassination of President Gabriel Garcia Moreno of Ecuador¹ the assassins were not anarchists. In that case Ecuador demanded from Peru the surrender of Roberto Andrade who was implicated in the murder of the said President. The demand was refused on the ground that the time for bringing an action against Andrade had already elapsed according to the laws of Peru. Although the refusal to surrender was based on this technical objection, the minister for foreign affairs intimated in his report that the circumstances of the case were such as to render the extradition of Andrade inadvisable. He observed:

Your Excellency is aware that after an investigation which took place immediately, the action against the assassins of the President of Ecuador was suspended for seven years, the warrant of arrest against Andrade having been issued only in 1883. Nothing was done with a view to the extradition of the criminal. On the contrary in 1873 and in the very year 1883, the accused resided in Ecuador as delegate to the assemblies of Ambato and Quito. Thus, the courts of Ecuador, which could *de officio* proceed against an offender whose crime stirred the entire nation, and which is still remembered with the ardor that great historic figures produce among peoples, do not present to the Peruvian government the necessary evidence in order that a friendly nation may without inconvenience cooperate in its action for the re-establishment of the disturbed social order. After 1883 the steps taken to secure the return of the offender were sporadic and, moreover, neither significant nor public. So there is in them no basis to surrender a resident of our national territory.

1. Peru, *Memoria de relaciones Exteriores de 1892*, pp. 51, 134; brief of the accused *Exposición jurídica que á los poderes públicos de la nación Peruana eleva D. Roberto Andrade con motivo de la demanda de extradición interpuesta por el gobierno del Ecuador*, Lima, 1891.

The case of Andrade raises an interesting point. The extradition of the accused was previously denied by the Supreme Court of Colombia because of some defect in the requisition. Although his surrender was denied on account of this technical objection, could Andrade have pleaded the decision of Colombia in his favor as a matter of defense in the second demand for his extradition by Ecuador? Suppose Columbia's refusal had been based on the political nature of the offence, would that have made any difference?

THE CASE OF JAFFEI

In a no less famous case¹ decided by the Swiss Federal Tribunal in 1901, Jaffei was extradited to Italy for complicity in the assassination of king Humbert. Jaffei was an avowed anarchist. In the warrant of arrest issued by the criminal branch of the Court of Appeal of Milan, Jaffei was accused of being a co-author or an accomplice of the double crime of regicide and murder and of conspiracy against the security of the state. The court ordered the extradition of Jaffei not for participation in the regicide nor for conspiracy against the Italian State but for participation in the murder. Regicide as such, according to the court, is a political offence for which extradition cannot be granted. We suspect the court is indulging in logomachy. Here is a case which gave rise to two offences at the same time and what is generally called by writers as a "complex" crime. To separate regicide from murder when both originated in the same act is very much like splitting hair. As regicide is regarded under the Swiss and Italian laws as a political offence, the court must find a way out of a difficult situation. The following excerpt from the decision of the court may be taken as a classic statement about anarchists:

It is proper to inquire if the act of Bresci, in which Vittorio Jaffei is charged with having participated, may be con-

¹ *Entscheidungen des schweizerischen Bundesgerichtes* (1901), XXVII, part 1, 52 et seq.; Langhard, *op. cit.*, 53-56; comments thereon of Julian W. Mack, *Proceedings*, Am. So. Int. Law, III, 151; Grivaz, "L'extradition en matiere de crimes politiques et sociaux", *R. D. I. P.* IX (1902), 701; Lehr, "Quelques mots sur un cas d'extradition recent entre la Suisse et l'Italie", *J. D. I. P.* XXIX (1902), 74; Travers, *op. cit.*, IV, 531-532.

sidered as a political act. The question ought to be resolved negatively. According to all the surrounding circumstances disclosed by the press and the debates, the assassination at Monza, although it is not perhaps, as the Italian authorities admit, the work of a single person, is a fact which, neither in its origins, nor in its consequences, does present itself as being in correlation with a definite political object or social movement; neither before, nor after the attempt, has the least political influence been produced; the attempt, not being the means to attain a political or social object, had no determinate and immediate object; the assassin only desired to manifest in a striking fashion that he considered the king of Italy as a being who deserves to be annihilated and to terrorize the population by making him disappear from among the living. From the political point of view, an analogous act has no more importance than either the assassination of another eminent functionary of state which we seek to justify by saying that the State and the functionaries of State are absolutely superfluous, or such theft or brigandage which we pretend to excuse by reason that the author is a systematic enemy of individual property and therefore cannot be held to respect it *in concreto*.

THE CASE OF THE FORT COUPLE

Twenty years after the above decision was handed down by the Swiss Federal Tribunal, the German *Reich* had occasion to pass upon the demand of the Spanish government for the surrender of the assassins of Premier Dato.¹ Although the extradition of the fugitives was also granted in this case, the decision of the *Reich* does not brim over with the same eloquence. The facts are briefly these: On the evening of March 8, 1921, while the Spanish Prime Minister, Don Eduardo Dato, was on his way home from the Senate, he was fired at by unknown assailants. He died shortly afterwards from the wounds received. The investigations revealed that the authors of the foul deed were members of the *Sindicato Unico*. Luis Nicolau Fort and his wife, Lucia Joaquina Concepción, who were among the suspects, were apprehended in Berlin and put under provisional arrest with a view to their extradition. The communists in Germany and Spain at once protested vigorously against their extradition because of the alleged political character of the charges. Meanwhile the Spanish government demanded the extradition of the couple on charges of murder and par-

1 Dr. Wolfgang Mettgenberg, "The Extradition of the Assassins of the Spanish Premier Dato by the German *Reich* (Fort Extradition Case), *Am. Jour. Int. Law*, XVI (1922), 542, *et seq.*

ticipation in the murder. The request was granted subject to the condition that a possible death sentence may not be imposed upon the accused. The decision was based upon the theory that the murder of Dato was purely an act of revenge and was not accomplished in furtherance of any political aim. Dr. Mettgenberg laid down the rule for determining the nature of an offence. Common offences are connected with a political offence if they "are intended to prepare, support or conceal an offence political by its nature. An offence that is by its nature common, which by itself alone fulfills its purpose, does not possess this connection, although its motive or purpose could be termed political... The minister of justice... announced that... the murder of Dato, as well as the other acts of the syndicalists, were intended as acts of revenge and terrorism. As a matter of fact this agrees with what the partisan friends of the prosecuted persons in Spain and in Germany published with regard to the reason of the murder. According to this, the deed was to be the execution of a death sentence pronounced by the syndicalists against Dato. Hence, the deed fulfilled its purpose by itself alone. There is no recognizable connection with any political crime." If the communists were in the majority in the Reichstag there would seem to be no chance for Spain to secure the return of the Fort couple. The strong opposition aroused in Germany against the surrender of the fugitives clearly indicates a new trend in the conception of political offences. What appears to be an obstacle to the solution of this problem is the fact that in most countries the decision involving the surrender of political offenders is so linked up with the policy of governments. This matter is aggravated by the recent practice adopted by the government of the *Reich* in submitting the Fort case to the Reichstag, a practice not followed elsewhere. The disadvantage of this practice is obvious. The government will have to reckon with the public opinion. This fact is recognized by the Minister of Justice in his declaration to the Reichstag:

The solemn wish of the government has been expressed to the Spanish Ambassador that a possible death sentence against

the two Spaniards may not be executed. I believe that is not only the wish of the government, but also the desire of large elements of the German people, who condemn the murder, regardless of the causes for which it may have been committed, as far as it is not connected with a willingness for self-sacrifice, but who do not wish to see those who commit a crime because of their conviction, no matter how misguided this conviction may be, placed on a par with common murderers.

Carrara¹ has truly said:

Policy and justice are not in accord; justice escapes by the window when policy enters the temple of justice. Political offences are the work of fortune and not of law; a *coup* of the majority makes law what another *coup* of the majority will soon change into a transgression of the law; the issue of a battle decides the constitution of a State and the offences which attack it. That is therefore an empirical not a philosophical matter; a rational theory of penal law is not built upon these bases.

THE CASE OF HARTMAN

Anarchistic crimes is a generic term which includes a variety of offences from mere affiliation with the association of malefactors to the murder of the head of a State. In 1880 Russia demanded from France the surrender of Hartman² who was accused of being the author or an accomplice in an explosion on the railroad near Moscow. The object of the author was to blow up the imperial train which was expected to pass over that road. France refused to surrender him on account of the failure of the Russian government to identify him and of the lack of sufficient evidence to establish his criminality. He was, however, expelled from France. Thence he went to England from which country Russia did not consider it opportune to demand his extradition. The Hartman case, according to Renault, does not serve as a precedent as the question whether or not the offence was political was not decided in that case.

THE CASE OF MALATESTA

Quite different from other types of anarchistic acts are the offences charged against Pistolosi and Malatesta whose extradition was demanded by Italy on account of their affiliation with the association of malefactors. Membership in this organization is prohibited by the Italian Penal Code. In both of these cases the demand was refused by the Fed-

¹ Brusa, "Francesco Carrara", *R. D. I.* (1888), 73.

² Calvo, *op. cit.*, II, 589 *et seq.*

eral Tribunal. In the Malatesta¹ case the court decided that an association which has for its object the overthrow of the established public and social order and its substitution by another political or economic system clearly pursues a political object. The fact that this association resorts to means other than pacific propaganda in order to attain its end is of no consequence. It is difficult to reconcile this case with the Jaffei case.

C. DELITS DE PRESSE

There are other types of political offences commonly called *délits de presse*.² According to Laire, this class of offences has generally been treated as political. The better opinion would seem to be that not all offences committed by means of the press are of political character. Such crime as seditious libel, for instance, is clearly political. But a publication may likewise injure private interests, such as a criminal libel, incitement to murder and incendiarism and outrage to morals. These offences are clearly not political. A curious case is reported by Saint-Aubin.³ In 1906 Belgium demanded from France the surrender of a Belgian newspaper editor accused of having committed outrages against morals by inciting minors to debauchery. He objected to his extradition alleging that the offence charged consisted in the publication in his newspaper of certain advertisements. It was also alleged that public morals were not outraged by such publication and that there was no proof that he had actually incited the youths to debauchery. The evidence established beyond doubt that he had committed the offence. There was no proof, however, that the said publication had actually had a demoralizing effect upon the youths. A professor of the faculty of law of Paris, who was consulted by the government on the matter, opined in favor of his extradition. The French government, however, refused to surrender him on the ground that the offence was a *delit de presse*.

¹ *Entscheidungen des schweizerischen Bundesgerichtes*, 1891, XVII, 450-457; Langhard, *op. cit.*, pp. 51-52.

² On the subject of *délits de presse*, see Laire, *op. cit.*, p. 206, *et seq.*; Beauchet, *Traité de l'extradition*, (Paris 1899), pp. 264-266.

³ *Op. cit.*, I, 418-419.

CHAPTER IV

THE RATIONALE OF THE PRINCIPLE OF NON-EX- TRADITION OF POLITICAL OFFENDERS

Can the right of political asylum be legally justified? The question has been examined from both municipal and international points of view.¹ Much time has been wasted in the discussion of the question whether or not a political offence is of lesser perversity than a common crime. From the point of view of international law this aspect of the question is unimportant because the exemption of a political offender from extradition is not dependent upon the fact that a political offence is less perverse or immoral, but upon some other grounds. A distinguished writer has observed that if international law makes an exception of political offences it is not because they have no immoral or dishonorable aspects. On the contrary such is not often the case. Moreover, the intrinsic nature of an offence is immaterial in extradition. As a proof of this, a common offender cannot plead the purity of his motive.² As no revolution happens without some common crimes being committed the problem would seem to be how to reconcile the so-called right of revolution with lawlessness which often accompanies it.

That the principle has been abused is beyond doubt. In some instances the asylum states have been rather too lenient in dealing with political offenders. The value of the principle has been shaken by the activities of anarchists as a result of which various attempts have been made to restrict the application of the rule. The reaction was such that some writers even doubt the wisdom of differentiating political from common offenders.

Says Heffter: "The principle of extradition once admitted, is there any reason for establishing a distinction drawn from the different nature of crimes? Strictly speaking, not. Still an exception is allowed in favor of political

¹ Grivaz, *op. cit.*, ch. 3.

² Weiss-Lammasch, *op. cit.*, pp. 1-2.

crimes, and the extradition of persons charged exclusively with political crimes, is nowadays ordinarily refused."¹

"We consider in democratic law," writes Mailfer, "the people as all united against attempts at human life, property and popular sovereignty as rights emanating from natural law. The extradition should be accorded in democratic law and if it is not yet so it is because democratic law has not been uniformly adopted; it is because political offences for which extradition is unanimously refused by the states of Europe, are not crimes against popular sovereignty whose right is universal, but against monarchy whose right is local."²

Bernard is of the opinion that the principle of non-surrender of political offenders should be considered only as a provisional measure. He added that as civilization advances and governments become more democratic, there ought not to be two categories of offences.³

According to John Bassett Moore, the United States government has always discouraged the granting of asylum not only because it lacks legal foundation but because it often gives rise to international difficulties.⁴

The view that political asylum is without juridical basis is shared by Liszt.⁵

Some publicists openly advocate the abolition of this distinction. Thus, Rivier predicted the eventual disappearance of this class of offences, it not only being useless but also against our modern juridical conception⁶

The principle of non-extradition of political offenders has been attacked by Olivart as the worst kind of intervention in the internal affairs of the demanding state.⁷

¹ *Droit international*, p. 130.

² *De la démocratie, dans ses rapports avec le droit international*, p. 259, cited by Grivaz.

³ *Op. cit.*, II, 252-253.

⁴ "The Case of the Salvadorean Refugees", XXIX, *Am. Law Review*, p. 20. It should be stated, however, that Judge Moore meant asylum in foreign legations and in vessels.

⁵ *Zeitschrift für die gesamte Strafrechtswissenschaft* (1882), p. 65, cited by Grivaz.

⁶ *Principes du droit des gens*, I, 354; see also James Brown Scott, *Am. Jour. Int. Law*, III (1909), 459.

⁷ *Derecho internacional público*, Madrid, 1903, I, 304.

Sir Francis Piggott asserts that the majority of the so-called political offenders deserve no better fate than to face a firing squad.¹

Some writers go so far as to say that political offenders, as a matter of fact, are worse than ordinary criminals because their activities entail greater evils.²

Professor Olivi would restrict the application of the rule to those charged with absolute political offences, thus leaving those accused of the so-called relative political offences subject to extradition.³

On the other hand, we have the statement of Thomas Jefferson that to resist tyranny is not a crime but a virtue.⁴

Bluntschli gives as a reason for the principle of non-surrender of political offenders the fact that they do not endanger other states inasmuch as they are exclusively directed against the constitution and political organization of a given state. Moreover, he added, there is lacking political solidarity among nations. Those who are punished in one country as guilty of a political offence are regarded as heroes by others and their persecutors as enemies of right and justice. Justice, humanity and goodly policy require that protection be accorded to political refugees.⁵

Fiore, after due consideration of the opinion of various writers, arrived at the conclusion that political offences, having their origin in the conception of party and political sentiments, are not tainted with the same perversity and immorality that characterize common crimes. The vicissitudes of human affairs obscure their immorality which varies according to epochs and events.⁶

1 *Extradition*, p. 22.

2 Grivaz, *op. cit.*, p. 146; Langhard, *Das schweizerische Auslieferungsrecht* (1910), p. 75.

3 See report of Alberic Rolin on the revision of the Oxford resolutions concerning political offenders (1892) *Annuaire*, XII, 160.

4 Mr. Jefferson, Sec. of State, to Messrs. Carmichael and Short, March 22, 1792, *Am. State Pap. For. Rel.*, I, 258; Moore, *Digest*, IV, Sec. 604.

5 *Le droit international codifié*, trans. by Lardy (Paris, 1893), Art. 396, p. 235, note; see also Buntschli's *avis* on the extradition of political offenders, vol V. *Annuaire*, 102-105.

6 *Traité de droit pénal international*, I, 588.

The same argument is advanced by Vidal. Speaking of political offenders, this noted French penalist said: "Whereas formerly the political criminal was treated as a public enemy, he is today considered as a friend of the public good, as a man of progress, desirous of bettering the political institutions of his country, having laudable intentions, hastening the onward march of humanity, his only fault being that he wishes to go too fast, and that he employs, in attempting to realize the progress which he desires, means irregular, illegal and violent."¹

It is alleged by others that the exemption of political offenders from extradition is derived from the very nature of extradition itself. Inasmuch as political offenders are not punished by the legislation of the asylum state, to surrender them, would be an abdication of sovereignty and subordinate its internal legislation to that of a foreign state.²

Speaking before the American Society of International Law, Mr. J. Reuben Clark, Jr., suggested that, in view of the fact that political offences do not give rise to extradition, it would perhaps be more accurate to call them "political acts." Strictly speaking, he said, a political offence is not a crime because it lacks the essential elements of the latter.³

Oppenheim justified the rule in the following significant passage:

I readily admit that every political crime is by no means an honourable deed, which as such deserves protection. Still political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the government concerned. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways of bringing grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home State for deeds done in the interest of the same freedom which the subjects of such free country enjoy.⁴

¹ Vidal, *Cours de droit Criminel*, p. 111.

² Funck-Brentano et Albert-Sorel, *Précis du droit des gens*, p. 186; Teichmann, "Les délits politiques, le regicide, et l'extradition," *R. D. I.* XI, (1879) 487.

³ *Proceedings*, Am. Soc. Int. Law (1909), III, 95-125.

⁴ *International Law*, I, 519.

Travers has his own theory. He maintains that the exception in favor of political offenders should not be considered as a rule of law but rather as a usage arising out of the difference in the constitutions of various countries, the advantage which each country may derive from the internal disorder of others, the governmental instability which characterized the epoch when the principle of exclusion of political offenders took shape, and the fear of diplomatic difficulties which a different treatment of political refugees from various countries might involved. Consequently, he added, extradition ought to be refused for all political acts when the countries concerned do not entertain the same notion as to their criminality or when the examination of the criminality of said acts would imply a judgment on internal politics of a foreign state.¹

Opinions of other publicists both for and against the proposition cannot be catalogued here.² But the above cited opinions of leading authorities are enough to show the lack of harmony among them. This radical divergence of views depends much upon one's predilections and prejudices. The whole controversy centers around the so-called relative political offences. The questions which we propose to answer are these: Has the principle of non-extradition of political offenders foundation in international law? If so, what is the legal basis for such a rule? Before attempting to answer these questions it may not be amiss to state here, even at the risk of repetition, some of the important considerations in the development of the rule.

It is said that the tide of political asylum rises or ebbs in similar proportion as despotism increases or decreases. This is amply proved by history. The *émigrés* who fled from France in order to escape the Reign of Terror were given asylum by foreign states. At the time of the Holy Alliance political refugees found a ready asylum in the liberal countries of Europe. Even Turkey defied her powerful neighbors by refusing to surrender to Russia and Austria the

1 *Le droit pénal international* (Paris, 1921), IV, Nos. 2060, 2061.

2 The opinions of various writers are systematically grouped in Fauchille, *op. cit.*, I, 1012-1014; they may also be found in Grivaz, *op. cit.*, ch. 3.

citizens of those countries who had taken part in the ill-fated revolution of 1848. As we glance in retrospect over the history of political offences, we find the powers bungling along until they hit upon a common policy of not giving up political refugees. It was a *fait accompli* which we are trying to justify legally. The modern doctrine, therefore, of excepting political offences from extradition derives its origin from the "classical notion of tyranny" to which its supporters still cling notwithstanding the changes in our social and governmental organizations. This changed situation demands a restatement of the principle bringing it into harmony with actual life. With the passing away of the abnormal circumstances which obtained in the latter half of the 19th century, a violent reaction set in, and a group of writers rose to the front advocating the curtailment, if not the abolition, of the principle. There is substantial truth in the explanation of Travers as to the various factors that have influenced states in their dealing with political offenders, and the intimate association of the principle with the variant policy of states renders our task of seeking a true juridical basis for such a rule extremely difficult.

The best answer to the argument that political asylum has no foundation in international law is its universal adoption in all modern extradition treaties. It is generally believed the even in the absence of express prohibition no state of any consequence would ever deliver up a political refugee. In some countries, in addition to the treaties, the municipal laws provide such a guarantee; while others have gone farther still by abolishing the death penalty with reference to their nationals who may have been convicted of political offences.¹ The principle of non-surrender of political offenders is admitted by the majority of writers on international law.²

1 In France, for instance, the death penalty was abolished by the Constitution of 1848 for political offences. As to the distinction made in France between political and common criminals with reference to penalty and treatment, see Vidal, *Cours de droit criminel*, Paris, 1916, p. 113; Ferrari, "Political Crime and Criminal Evidence," *Minn. Law Review*, III, 369.

2 Kluit, *De deditione profugorum*, p. 79; Billot, *Traité de l'extradition*, p. 102; Saint-Aubin, *L'extradition et les délits politiques*, I, 392; Laire, *L'extradition et les délits politiques*, p. 96; Grivaz, *L'extradition et les délits politiques*, p. 159; Fauchille,

As may be seen from the above opinions of writers various theories have been adduced in support of the principle of excepting political offenders from the operation of extradition treaties. They miss, however, the precise legal ground upon which the principle rests. It is due to this failure that some writers on international law have denied the existence of a sound juridical basis in support of the rule.¹

The remark of Sir Cornewall Lewis that political offenders might be surrendered if the demanding government could judge them impartially,² besides being impracticable, is open to serious criticism. How will the asylum state enforce compliance with the guarantee? There is no question that in times past the refusal to surrender political offenders was to some extent due to the feeling that they might not be given a fair trial by the demanding state. The establishment of exceptional tribunals in some countries for the trial of such offenders had increased such fears. At the time when passion runs high and the desire to wreak vengeance on those who have dared to overthrow the established order is uppermost in the victorious party, to surrender political offenders under the circumstances would be equivalent to delivering them up to their executioners. This argument, however, loses its *raison d'être* once a political refugee is assured of an impartial trial by the demanding state. Given that assurance, can the asylum state deliver him up without violating its duty of non-interference in the internal affairs of the demanding state? To surrender him under the circumstances would be to

Traité de droit international public, I, 1014; Bluntschli, *Le droit international codifié*, Art. 396; Stieglitz, *Etude sur l'extradition*, p. 91; Lawrence's *Wheaton Elements of International Law*, p. 245, note; Woolsey, *International Law*, Sec. 79; Moore, *Extradition*, I, 303; Phillimore *International Law*, I, Sec. 369; Wharton, *Conflict of Laws*, Sec. 948; Westlake, *International Law*, part I, Godoy, *Tratado de la extradición*, p. 62; Gibbs, *Extradition Treaties*, p. 12 Lewis, *On Foreign Jurisdiction*; Fiore, *Droit pénal international*, I, 583; Pitt Cobbett's *Leading Cases* (Bellot's ed.) I, 250; Bar, *International Law: Private and Criminal*, transl. by G. R. Gillespie, Boston, 1883; p. 722; Planas Suarez, *Tratado de Derecho Internacional Público*, Madrid, 1916, I, 263; Pradier-Fodéré, *Traité de droit international public*, Paris, 1885-1906, III, 1131.

1 Laire, *op. cit.*, p. 85.

2 *Op. cit.*, p. 44.

help one of the parties in the struggle. The asylum state would thereby become a partisan in the civil strife.

"The right of asylum in cases where political offences are involved is sacred," says Geyer, "for if the State of refuge desired either to punish or extradite the author of political crimes, then would devolve upon this State the decision of the preliminary question whether the foreign government and constitution which were attacked are legitimate. It is plain that a tribunal could not decide this question since it would lack some necessary elements for such a decision. Moreover, the tribunal would find it difficult not to stir up international complications."¹ Moreover, such an action would amount to a proscription of the so-called right of revolution even in cases where tyranny is rampant. No one since the days of Hobbes has seriously contended that a government, which has become tyrannical, may not be overthrown. This fact is recognized in the report of the British Royal Commission on Extradition of 1878 which states:

And however odious the character of the rebel who disturbs the peace of his own country and gives rise to bloodshed and disorder from interested motives, or reckless disregard of the miseries attendant on civil discord, yet both from history and our own experience we know that there are exceptional instances in which resistance to usurpation or tyranny may be inspired by the noblest motives, and in which, though unsuccessful, it may escape condemnation and even command sympathy.²

A writer advances the novel theory that the doctrine of non-extradition of political offenders should not be applied to colonies of primitive culture on the ground that the mother country holds them in trust for civilization and, therefore seditious acts should be considered as anti-social crimes.³ This distinction is clearly unsound.

Bluntschli speaks of the lack of political solidarity

¹ Holtzendorf, *Encyclopédie*, 1870, p. 540, cited in Calvo, *op. cit.*, II, 577.

² *Report of the Royal Commission on Extradition*, London, 1878, p. 7.

³ Halot, "De l'application aux colonies des traités d'extradition," *Revue de droit public*, 1966, cited in Laire, *op. cit.*, p. 202. "Likewise acts of rebellion committed by the natives (of a colony) may give way to extradition. What the natives combat is not the republican, feudal or monarchical character of the constitution of the State which exercises sovereignty over their countries but all foreign domination. All colonizing nations have, whatever may be the form of their own constitution, the same notion of culpability with reference to native agitations." Travers, *Le droit pénal international*, IV, No. 2064.

among nations as the underlying reason for the exemption of political offenders from extradition. This argument is not totally devoid of force. As already stated, formerly political refugees were delivered up because the despotic rulers of Europe thought it best to suppress every attempt at political reforms. At the present day they are looked upon with less favor than formerly. And there are even those who believe that the time might come when democratic institutions will have reached such a degree of perfection as might induce nations to proscribe a revolutionist just as they do a common criminal. Notwithstanding, however, the optimism of these writers and the positive assurance of Mr. Elihu Root in 1919 that we were "ten times as good a people as we were five years ago"¹, there are no visible signs as yet on the political horizon that civil wars will stop in the immediate future. We are inclined to believe, on the contrary, that civil wars will go on as long as men disagree upon fundamental questions which they are unwilling to settle by peaceful means.

The privilege universally accorded to political offenders is not bottomed upon the theory that political offences are not in reality crimes as has been suggested (political offenders, regardless of other considerations, are none the less criminals because they have violated the laws of the demanding state), but rather upon the theory that, to surrender them, would be inconsistent with the duty of non-interference which one state is bound to observe towards another. This is clearly implied from the language of the report of the British Royal Commission on Extradition. It says: "It is true that it is to the interest of every nation that by the submission of its subjects to the constituted government internal peace and order shall be maintained. But one nation can scarcely be said to have such an interest in the particular form of government, or in the particular ruling dynasty, of another, as that it should be called upon to make common cause with it against political offenders"²

¹ Root, *Men and Policies* (1924), p. 209, quoted by Prof. Manley O. Hudson in an article published in the *Cornell Law Review*.

² *Report of the British Royal Commission*, 1878.

The researches of Grivaz¹ and Laire² confirm our conclusion. This theory is sustained also by the Swiss Federal Tribunal in the Belenzow case, *supra*. According to these writers, the principle of non-extradition of political offenders is grounded upon the duty of non-intervention. The giving up of the vanquished party to the victors would be an interference in the domestic affairs of the demanding state.

In view of the popular connotations of the term "intervention," the term "non-intervention" is not wholly satisfactory. For instance, Olivart evidently uses the term "intervention" in a popular sense as to include the failure of a state to comply with the demand of another even in the absence of a legal obligation.³ How can the failure to surrender a political offender be construed as an interference in the internal affairs of the demanding government when it is expressly provided by treaty that surrender shall not take place if the offence committed is of a political character and the decision whether or not an offence comes within the exception rests with the asylum state? The requested state is not, therefore, bound to comply with the requisition of the demanding government in cases of this kind. On the contrary it is bound not to surrender political offenders by express stipulations of the treaty.

The value of the principle is attested by the further fact that it may also be claimed by reactionary political offenders. If a revolution breaks out in one state in behalf of a reactionary movement and fails, the neighboring state may not deliver up these reactionary political criminals who may have sought asylum within its territory without violating its duty of non-interference with the domestic affairs of the demanding state. Kluit would seem to deny the extension of the privilege to reactionary political offenders. Thus, he asked: "Are persons to be admitted to asylum or extradited whose motive for entering a cons-

¹ *Op. cit.*, p. 159.

² *Op. cit.*, p. 86.

³ For the technical meaning of the term "intervention", see Westlake, *op. cit.*, part I, 304; Fauchille, *op. cit.*, I, 581; Moore, *Digest*, IV, 2.

piracy was only their love of subversion and who rebelled against a righteous sovereign without just cause?"¹ The better opinion, however, is that both classes of political offenders are entitled to the privilege.²

¹ *Op. cit.*, pp. 84-85.

² *Oppenheim, op. cit.*, I, 520.

CHAPTER V

WHAT IS A POLITICAL OFFENCE?

A. POLITICAL OFFENCES DEFINED

Various definitions of political offences have been attempted none of which, however, appears wholly satisfactory. What constitutes a political offence depends largely upon the circumstances of the case.¹ Judge Denman has pointed out the futility of attempting an exhaustive definition for it cannot embody all the circumstances attending the act. The following are some of the definitions of political offences:

Crimes which are primarily directed against the form of government are called political offences (*crimina, quae primario regiminis formam spectant.... nuncupantur politica*).²

Political offences are all attempts (*attentats*) against the constitution of a government and against sovereignty.³

Political offences are those which disturb the order established by the fundamental laws of the State, the distribution of powers, the limits of authority of each citizen, the social order, and the rights and duties derived therefrom. Any act whatever of this nature is a direct attack against the existence of the State, and, therefore, against its political existence.⁴

By political offences we understand such crimes and offences which are exclusively directed against the political order and which tend to overthrow, change or disturb it. The political order embraces, externally, the independence of the nation and the integrity of its territory; internally, the form of government established by the constitution and the constitutional authority of public powers, namely, the chambers and the king; hence also the obligatory force of the laws; the inviolability of the person of the king, and the constitutional rights of his dynasty.⁵

Political crimes and offences are criminal attacks directed immediately against the State which injure the same in its head or endanger its external or internal security. Punishable offences which are committed in causal connection with political crimes receive the same treatment in extradition. The motives and the intention of the agent are irrelevant to the question whether the crime is political or not. It is equally immaterial whether the political offence embodies at the same time the elements of a common crime. Excepted is only

1 Moore, *Extradition*, I, 308; Fiore, *op. cit.*, I, 598-599.

2 Kluit, *op. cit.*, p. 79.

3 Filangieri, *La scienza della legislazione*, Book III, part 2, ch. 43, p. 726.

4 Fiore, *Traité de droit pénal international* I, 592.

5 Haus, *Cours de droit criminel*, sec. 113, quoted in Calvo, *op. cit.*, II, 578; *ibid.* *Principes généraux du droit pénal Belge*, Paris, 1879, I, 252.

the case of a consummated or attempted murder, &c., of the head of a foreign government or the members of his family.¹

Political offences, according to Von Bar, are not "co-extensive with the class of offences against the State." Thus, he defines them as follows:

It seems just that these acts only should be regarded as political offences which can be shown to arise out of a tendency to change the constitution of the State, or to revolutionise its arrangements in all illegal fashion, or which, although themselves exceeding the formal limitations of the law, can be held to be adopted as a defence against acts of the Government that are formally at variance with the law or with the principles of justice and equity.²

All acts which have for an object the commission of an offence by illegal means against the political or social order established in a country come under the category of political crimes and offences.³

Faustin Hélie defines political offences as "those which attack solely the Constitution of the nation in its social form essentially variable and the criminality of which is itself dependent upon the times and places."⁴ According to Grivaz⁵ all offences which infringe upon the special rights of the State are political. These special rights are:

Those which belong to the State considered as public power, as political power. From this point of view, the rights of the State are of two kinds: those which have as their object the external political order, that is, the independence of the nation and the integrity of its territory; and those which affect the internal political order, that is, the maintenance and security of government and of political institutions established and practiced according to the will of the sovereign.

John Stuart Mill in the course of a debate in the House of Commons in 1866 defined a political offence as "any offence committed in the course of or furthering a civil war, insurrection, or political commotion,"⁶ In *re Cas-*

1 Loewenfeld, "Erörterung des Begriffes politischer Verbrechen und Vergehen im Sinne der Auslieferungsverträge des deutschen Reichs", *Zeitschrift für die gesamte Strafrechtswissenschaft*, V, 46, 114.

2 *International Law: Private and Criminal*, Boston, 1883, p. 718.

3 Billot, *op. cit.*, p. 102.

4 *Pratique criminelle des cours et tribunaux*, II, 25.

5 *Op. cit.*, p. 213-214. An excellent collection of the various definitions of political offences is found in chapter IV of Grivaz's valuable monograph on the subject. The author has classified these definitions into (1) subjective the criterion of which is motive (*motif*) or intention (*but*), (2) objective which determine the nature of the offence according to the nature of the right violated, and (3) particular in which other elements are taken into account.

6 *Hansard's Debates*, vol. 184, p. 2115.

tioni, supra, the court adopted the well-known definition of Sir James Stephen according to which political offences are those which are "incidental to and form a part of political disturbances."¹

Other English definitions may be quoted:

In view of the precedents it must be stated that every act is a political act which has a political purpose in view even though the act is in itself and apart from its political purpose a detestable crime.²

The term 'political crime' has two meanings. Perhaps the more familiar one is that of crimes against governments, such as treason, insurrection, and rebellion. The other meaning is that crimes perpetrated by governments for alleged reasons of state, and by politicians for alleged reasons of expediency or for political advantage.³

Now, what has always been understood as a political crime is a deed directed against the persons or things representative of the collective authority, with the purpose of bringing about directly or indirectly, a violent change in the frame work of social institutions, according to a certain plan of reform in opposition to the opinions of the majority which rule the community.⁴

It may be said that those offences are popularly called political, which are committed with a political object. In this case a crime is political, the object of which is (1) to bring about or further a change in the form of government of a State or in the composition of the Government; or (2) to influence the action or legislation of the Government; or (3) to bring the Government into disrepute.... If we accept the popular conception of political offences, they can be roughly divided into three classes.

One consists of acts done in furtherance of insurrection or political tumult which would not be unlawful if committed against belligerents. A second class consists of offences which are made criminal because their object is political, and which have no ordinary criminal intent. The third class includes acts committed with a political object which, apart from such object, have an ordinary criminal element. Offences that belong to the first or second class may not unaptly be called 'pure political crimes'. Those which must be placed in the third class are 'mixed crimes'.⁵

Ferrari would extend the definition of political offences so as to include such crimes as are not ordinarily punished by the penal law but are made crimes by statutes,

1 *History of the Criminal Law in England*, II, 71.

2 *Howley On Extradition*, p. 116.

3 Prof. Guidding's introduction to *Political Crime* by M. Luis Proal, pp. V-VI.

4 Gustavo Tosti, "Anarchistic Crimes", *Political Science Quarterly*, XIV (1899), 404.

5 De Hart, 2 *Law Quarterly Review*, p. 177 *et seq.*

like the Federal Espionage Act, and those which arise out of the industrial and social activities. He said:

Crimes committed to change the industrial order which has taken the place of importance of the political order, and especially those crimes which are committed without the admixture of violence, or of any element which would give them a tinge of ordinary crime, that is, those that are not mixed or connected, but purely industrial, should be dealt with as political.¹

The foregoing definitions are greatly at variance. Under the older definition of Kluit and Filangieri, political offences are confined only to attacks against the government. This classic definition, however, soon became inadequate as the principle has been gradually extended to acts which are otherwise common offences had it not been for their presumed connection with a revolutionary enterprise. A similar change has taken place in the extradition treaties. On account of this extension of the rule various definitions have been put forth. Some writers stress the subjective element; that is, the motive or purpose of the agent, while others like John Stuart Mill and Sir James Stephen look at the matter objectively. Quite different from these definitions is that proposed by the penalists like Haus, Garraud, Vidal, Grivaz, Saint-Aubin, Travers and others. Political offences are thereby made co-extensive with violations of political laws. Moreover, they are not only restricted to attacks against the government by enemies from within but they also include assaults upon the independence of a state by enemies from without. Of the latter type of political offences we shall have more to say in connection with the attempted extradition of the former German Kaiser. Some publicists like Billot, Fiore, Pradier-Fodéré, and Weiss treat such offences as arise out of social unrest as political. A further extension of the rule is urged by Ferrari so as to include crimes growing out of industrial activities. From the above definitions it is clear that, theoretically at least, there has been a constant broadening of the scope of political offences, which goes to show that our conception of political offences is dynamic rather than static. It is still in the process of growth.

¹ "Political Crime", *Columbia Law Review*, XX (1920), pp. 313, 314.

B. DUAL CONCEPTION OF POLITICAL OFFENCES

Much confusion has been produced chiefly by the efforts of continental penalists in approaching the subject wholly from the point of view of municipal law. While there is no occasion for dispute as to such crimes as treason, conspiracy and seditious libel, yet on account of the diversity of penal legislation of the various countries, some difficulty might arise as to whether an offence regarded as political in one country would be so regarded in the other. So notwithstanding the opinion of some writers to the contrary, there has arisen a dual conception of political offences, a conception analogous to that of piracy which owes its origin to the decision of the House of Lords in the case of *Tivnan*, *supra*. As far as we are aware there has been no similar judicial pronouncement concerning political offences. This dual conception is inherent in the nature of things. So long as the decision whether or not an offence is political rests with the asylum state our notion of political offences will always be colored by divers penal legislation, our conception of government, and our divergent policy towards political offenders.¹

To cite a concrete illustration, Art. 6 of the French law of October 8, 1820, entitled "Law on the Application of the Jury to *Délits de Presse* and Political Offences", gives the courts of assizes jurisdiction over political offences. Art. 7 of the same law provides further that certain offences mentioned in the French Penal Code and the law of March 25, 1822, shall be regarded as political for the purpose of the application of its provisions. It is the consensus of opinion among French writers that this law does not furnish any criterion for the determination of what acts are political inasmuch as it had been repealed by the

¹ Moore, *Extradition*, I, 313; Lord Derby to Colonel Hoffman, May 4, 1876. *For Rel.* 1876; Saint-Aubin, *op. cit.*, I, 409; De Hart, *op. cit.*, p. 2; compare Mettgenberg, *Die Attentatsklausel im deutschen Auslieferungsrecht*, p. 74; Grivaz, *op. cit.*, p. 177.

² *Bulletin des lois (IXe série)*, t. 80, 79-80; *ibid.*; (*IXe série*) t. 14, 249; Duvergier, *Collection complete des lois, decrets, ordonnances, &c.*, (Paris, 1952) t. 52, 120.

decree of February 25, 1852.¹ French writers, however, take the French Penal Code as the starting point in making up a list of political offences. Thus, Saint-Aubin² enumerates a number of such offences such as those against the security of the State and against the Constitution, an illegal attempt to change the form of government, to rouse the citizens to revolt against the authority of the President of the Republic, and so forth. These offences are practically covered by treason laws in common law countries and, therefore, there can be no doubt as to their political character. But in addition to the above-mentioned offences, the learned author adds such crimes as the violations of election laws, attacks against personal liberty by prison guards, the encroachment of the judiciary or the executive upon each other's function and so on. It is doubtful if the English and American courts would regard the last named offences as political.

The criterion adopted by some writers for judging the character of the offence by the nature of the right violated unduly enlarges the scope of political offences as the term is understood in international law and makes them co-extensive with violations of political laws. What those political laws are will necessarily depend upon the municipal legislation of each country and one's conception of government. This dual conception of political offences is clearly illustrated in a case decided by the Supreme Court of the Philippine Islands³ in which the court, speaking through Torres, J., held:

As a consequence of what has been stated, the court consider that the assault committed by the accused upon the president of the pueblo of Cagayancillo certainly affected public order and the principle of authority, and for this reason is of a political character in a general sense. But it is not a political offence of the class covered by the amnesty of July 4, 1902, inasmuch as the defendants, when they resolved and carried into effect the death of Marcos Buncag, did so under the provocation of certain abusive acts committed by Buncag,

1 Travers, *Droit pénal international*, IV, 525; Saint-Aubin, *op. cit.*, I, 409; "Du principe de la non-extradition pour délits politiques", report presented by Alberic Rolin to the Institute of International Law at the Geneva session, XXIV, R. D. I. (1892), 18.

2 Saint-Aubin, *op. cit.*, I, 400-410.

3 U. S. v. Bundal, *et. al.*, III, P. R. 99-100.

but it does not appear that the residents of the town seconded the revolution against the Government of Spain or took part in the resistance against the sovereignty of the United States. Neither does it appear that the deceased or his aggressors took part in the insurrection. Nor has it been shown that this hatred and ill will arose from political motives or strife connected with the past revolution, and it is therefore undeniable that the murder of the said president, Buncag, did not have the particular political character contemplated by said amnesty, and that the case does not fall within the letter or spirit of the proclamation, especially paragraph 3 thereof. It would therefore be error to hold that the defendants are covered by the amnesty.

Aside from the confusion which this dual conception of political offences has given rise to, the most difficult part of the problem, which is the stumbling block of jurists, is that with reference to the so-called relative political offences. As to the terminology used, some explanation might be useful. The various terms which have crept into the literature on the subject have caused no little confusion. Travers classifies political offences into pure or absolute, complex, and acts connected with political offences.¹ The first class is rare in practice. A complex offence is that which is punishable at the same time as a political crime or offence and as an ordinary crime² A classic example of it is regicide committed for a political purpose. An act is said to be connected with a political offence when it is repressed by the law but is connected with acts having a political character, such as robbery of a gunshop in order

1 Travers, *op. cit.*, IV, 535; *R. D. I.* XXIV, 18-19.

2 Travers, *op. cit.*, IV, 535. "Complex offences are those which, besides constituting an injury to the political or social order of the State against which they have been committed, injure at the same time purely private interests and thus constitute true common-law offences." Definition of Weiss cited by Rolin, *R. D. I.* XXIV, 19. "There is a complex offence when the delictual act injures at the same time the political organization and a private interest". Beauchet, *Traité de l'extradition*, (Paris, 1899) p. 208. "Since all crimes and misdemeanors are classified into two classes only, to wit, political or common, new terms can be introduced only as varieties of two main categories, or as in some way affiliated with them. The *délit complex* is a sub-class of the political crime and therefore comes under the first class. While its content is not free from uncertainty, its main signification is plain. F. von Martitz gives the following definition: 'We have to do with a *délit complex* every time where in criminal law a non-political crime contributes to establish the legal concept of political crime and thus appears as an ingredient in the ascertainment of the case. Here we are confronted with a unitary crime. These are cases of concurrence of laws.'" Mettgenberg, *op. cit.*, p. 75.

that a revolutionist may provide himself with weapon in the course of a civil war.¹ Some writers use the term "complex offences" as equivalent to relative political offences, and make no distinction between complex offences and offences connected with political crimes,² or between either of these classes of offences and the so-called pure political offences.³ Sometimes "mixed" and "complex" are used interchangeably. Frequently complex offences and offences connected with political crimes are spoken of as mixed offences.⁴ Grivaz suggested the term "concurrent" for these classes of offences.⁵ The term "complex" is not found in any extradition treaty and it is believed that the expression "acts connected with political offences" includes the complex offences.⁶ The term *fait connexe à un délit politique* originated in the French Code of Criminal Procedure (*Code d'instruction criminelle*) but underwent considerable modification in international law.⁷ The introduction of these various terms in the literature on the subject is not conducive to clearness. It might have been

1 "The *délits connexe* are those which, without confounding themselves with political crimes, are connected therewith by more or less narrow ties." Definition of Weiss cited by Rolin, *R. D. I.* XXIV, 19. The fact that the examples often cited by some writers as *délit connexe*, namely, the robbery of a gunshop for the purpose of obtaining weapons during a civil war, is regarded by others as a *délit complex* (See Beauchet, *op. cit.*, p. 208; Billot, *op. cit.*, p. 104) shows the confusion caused by the introduction of these terms in international law. According to Rolin the distinction between *délits complex* and *délits connexe* is that in the case of the former the connection between the political and non-political element is more intimate than in the case of the latter. Holland, in reply to a query of Rolin, informed the latter that the terms *délits complex* and *délits connexe* were unknown in England. He believed, however, that both terms are included in the expression "offences having a political character." *R. D. I.* XXIV, 28. See also Garraud, *Traité théorique et pratique au droit pénal français*, Paris, 1913, I, 270; Vidal, *op. cit.*, p. 117.

2 Fenwick, *International Law*, p. 214; Lawrence, *International Law*, (7th ed.) p. 241; Oppenheim, *International Law*, I, 516; Weiss-Lammasch, *op. cit.*, p. 51.

3 Question 3. Which, if any, of these criminalizing acts were political? All were purely political." Opinion of John H. Wigmore in the extradition of Christian Rudowitz. *The Case of Jan Janoff Pouren*, Appendix, II, p. 118.

4 Mettgenberg, *op. cit.*, p. 75.

5 *Op. cit.*, 226-227.

6 Laire, *op. cit.*, 122.

7 Mettgenberg, *op. cit.*, p. 87; Grivaz, *op. cit.*, p. 224. Art. 227, Dalloz, *Code d'instruction criminelle*: "Offences are connected, either when they have been committed at the same time by several persons jointly; or when they have been committed by different persons, although at different times and places, but as a con-

better if these various terms had been abandoned altogether. At any rate an offence must be either common or political.

The first radical departure from the principle of political asylum is the insertion in the treaties of a clause which provides that murderers of heads of States should be treated as any ordinary criminals and, therefore, subject to extradition.¹ The clause is not perfect for there might arise exceptional cases in which the surrender of the fugitive would not be advisable. This is the reason why countries like England and Switzerland prefer to leave the matter to the courts rather than be bound by express treaty stipulations. Fiore admits the possibility of an attempt being directed against the "moral person" and not against the man.² And Oppenheim said with reason that, although he could not sympathize with a murderer, yet a case might arise in which the murdered head of a State has, through oppression, "whetted the knife which cut short his span of life".³ The clause is based on the theory that a murderer should not be immune from punishment by the atrocious manner through which he seeks to accomplish his purpose regardless of political motive which might have inspired his act. It is a decided improvement upon the unrestricted principle of political asylum.

sequence of a plan formed in advance between them; or when the accused have committed some in order to procure the means with which to commit others, to facilitate, to complete the execution, or to assure the impunity; or when the goods stolen or obtained by means of a crime or offence have been totally or partly concealed."

1 On the general subject of anarchistic crimes, see Gustavo Tosti, *op. cit.*, XIV, 404; *For. Rel.* 1901, 196, 197, contains the proposal of Germany for concerted action by the powers against anarchistic activities and the reply of the United States government thereto. Articles by Dr. Angell, Ticknor Curtis and Judge Cooley in the *North American Review*, vol. 141, p. 47 *et. seq.*; Teichman, "Les délits politiques le régicide et l'extradition", *R. D. I.* IX, (1879) 475; Lombroso, "Anarchistic crimes and their causes", *The Independent*, Dec. 8, 1898, vol. 50, pp. 1670-1674; Diena, "Les délits anarchistes et l'extradition" *R. D. I.* II (1895), 332; *In re Meunier*, *supra*; the case of Jaffel, *supra*; the Fort Extradition Case, *supra*; report of Alberic Rolin on political offenders, *Annuaire*, XII, 156, 167; Edwin Maxey, "Extradition and Protection against Anarchy", *Yale Law Journal*, XVII, 376.

2 *Droit pénal international*, I, 592-593.

3 *International Law*, I, 520-521.

The various ways by which anarchists carry on their war against society have led some states to pass laws directed against them.¹ In the United States they are denied admission and are barred from becoming citizens.² An attempt was made at the second American International Conference to solve the problem by inserting a provision in the proposed extradition treaty providing that all acts of anarchists directed against the basis of social organization shall not be considered as political. This is admittedly a vague provision for as yet there is no general agreement as to what constitutes anarchistic crimes. Is a crime anarchistic because its author is an anarchist or is it so because of its inherent tendency?

The original draft of the extradition convention submitted at the American International Conference, held in the City of Mexico in 1902, was justly criticized by Mr. Leger as the phrase "acts of anarchists directed against the basis of social organization" might include the acts of the robber, the incendiary, or the revolutionists. Upon the sug-

1 For a discussion of the legislation concerning anarchists in various countries, see Loubat. "De la législation contre les anarchistes au point de vue international", *J. D. I. P.*, XXII (1895), 5, cont. in XXIII (1896), 294; Laire, *op. cit.*, 179-201; Travers, *op. cit.*, p. 530, note 2.

2 Section 3 of the Act of 1917, known as the Immigration Law, as amended by the Act of 1920, provides: "That the following classes of aliens shall be excluded from admission into the United States:.... anarchists, or persons, who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; persons who are members of or affiliated with any organization entertaining and teaching disbelief in or opposition to organized government, or who advocate or teach the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who advocate or teach the unlawful destruction of property.... *Provided*, That nothing in this act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offence purely political". Act of Feb. 5, 1917, c. 29, sec. 3, 39 Stat. L. 875, amended, June 5, 1920, c. 243, 41 Stat. L. 981; U. S. Com. Stat. 1925, sec. 4289 1/4 b. By section 1 of the Act of 1918 as amended by the Act of 1920, the classes of inadmissible aliens have been enlarged so as to include not only anarchists but also other aliens professing similar beliefs. It provides: "The following aliens shall be excluded from admission into the United States: (a) aliens who are anarchists, (b) aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society or group, that advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law or (2) the duty, necessity or propriety of the

gestion of Mr. Macedo the original draft was modified.¹ Article 11 of the draft convention as amended provides that such acts as are classified as pertaining to anarchism by the legislation of both the asylum and the demanding states should not be considered as political offences.

Contrary to the established doctrine that anarchistic attempts are common offences, Travers maintains that they should be treated as political because they are none the less directed against the political organization of the State as are other political offences and their principal object is to destroy it or at least to imperil its existence. If the extradition of anarchists is to be justified it must be on the ground that there exists among nations a common conception as to the criminality of anarchistic acts.² Although no satisfactory solution of the problem has as yet been found, much progress has already been accomplished by the rejection of political motive or purpose as a conclusive test for determining the nature of the offence irrespective of the surrounding circumstances.

C. TESTS FOR DETERMINING THE NATURE OF AN OFFENCE

Several tests have been suggested for determining whether an offence is political or common. The classical

unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage; (c) aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published or displayed, or that has in his possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision, (d). For the purpose of this section: (1) the giving, loaning, or promising of money or anything of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; (2) the giving, loaning, or promising of money or anything of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." Act of Oct. 16, 1918, c. 186, sec. 1, 40 Stat. L. 1012, amended June 5, 1920, c. 251 41 Stat. L. 1008; sec. 4289 1/4 b (1) U. S. Comp. Stat. 1925. Anarchists may also be deported at any time after entering the United States, 40 Stat. L. 1012; sec. 4289 1/4 b. (2) Section 7 of the Act of June 29, 1906, known as the Naturalization Act, 34 Stat. L. 598, prohibits the naturalization of anarchists. For discussion of the previous enactments, see *Bouvé on the Exclusion and Expulsion of Aliens*.

¹ *Debates and Resolution*, p. 189.

² *Op. cit.*, IV, pp. 529, 550.

theory is that an offence is political if committed with a political motive. This criterion of motive has been rejected by almost all modern writers on extradition. The theory of motive as affecting penal liability is a highly fascinating subject for a separate inquiry, but the limitations of this work would not permit more than a general consideration of the subject.

The term "motive" has been loosely used by writers. Some take it as identical with the circumstance that excites a particular emotion in a person or with the object that he seeks to accomplish. Salmond defines it as the ulterior intent or purpose as distinguished from the immediate intent.¹ Professor Wigmore calls it an emotion.² Whether it be the one or the other, it is clear that it is something that impels a person to commit an act. It is a state of mind. Professor Wigmore has pointed out that in the proof of motive there are two evidential steps involved; namely, the proof of its presence and the proof that it leads to a particular act. He has suggested that it would be more conducive to clearness if the term "motive" could be abandoned altogether in discussing evidential questions.

The influence of the theories of municipal penal law upon extradition is apparent by the adoption of motive as a test in determining whether a certain offence bears a political aspect or not. It may be stated in this connection that in criminal law motive is irrelevant except in certain types of offences; namely, attempted crimes and crimes in which a particular intent forms an essential element.³ In extradition, the so-called relative political offences are common crimes if not for their connection with a revolutionary enterprise. Political motive is a justification for the non-extradition of an offender. But this motive, as has been already stated, is a mental state and is manifested by the personal behavior of the individual and the surrounding circumstances. The criterion of motive is, therefore, valueless in so far as it remains a mere assumption or even

¹ *Jurisprudence* (Sixth Ed.), p. 340.

² *A Treatise on the System of Evidence in Trials at Common Law*, I, Sec. 117.

³ Salmond, *op. cit.*, pp. 344 *et seq.*

if partially proved by the uncorroborated testimony of the interested party. What is important after all is the fact showing the relationship between the delictual act and the revolutionary enterprise. If the offence is committed in open warfare the question of motive is immaterial just as it is irrelevant in consummated common law crimes.

In the case of crimes committed in an abortive attempt at revolution, the motive of the offender might at first glance be material as in the case of attempted crimes by analogy. Even in such cases the motive of the offender is proved by external facts and the conduct of the individual concerned. The fact that there was a bona fide attempt at revolution and that the particular crime charged had some connection therewith are all evidential matters. The infinity of circumstances showing this relationship cannot, in the nature of things, be catalogued in the definition of political offences. Neither is it desirable to do so as it would restrict the discretion of the committing magistrate. The criterion of motive should, therefore, be abandoned for there is no way of ascertaining the exact nature of the offender's motive. It is conceivable that his real motive might remain undiscovered as a judge once said that not even the devil could tell what one's real motive is. A person might be actuated by several motives in the commission of an offence.

Motive is hard to fathom and, as observes Westlake, "often mixed as because an admissible motive may be pursued by inadmissible means."¹ Faustin Hélie has remarked that one might be inclined to regard any offence committed with a political motive or purpose as political. Common crimes, however, do not lose their character because they are inspired by political motives. If the agent has not recoiled before murder or brigandage in order to accomplish his political design, the relative criminality of his intention will not protect him. It is immaterial whether it be vengeance, cupidity or political fanaticism which put the dagger into the hands of an assassin. His acts remains

¹ *International Law*, part I, 247.

murder none the less.¹ Discussing the political motive or purpose of the offender as not a valid defense in extradition Garraud said: "It is clear that the political or non-political character of an act which is a crime against the law is not determined by the existence or non-existence of either political motives or a political aim. It simply depends upon the nature of the act considered in itself. In other words, from the juridical point of view, it is just as futile to distinguish assassination, larceny, arson and political explosions, as to distinguish whether the assassination, the theft, arson or (political) explosion were inspired by vengeance, covetousness or love. Of course, the judge who examines the individual culpability may and will take account of the more or less anti-social, or more or less odious motives of the incriminated act. But whatever motive may have inspired the act, or whatever its aim may be, it remains what it is in itself, to wit, assassination, arson, larceny, or an explosion; that is, it remains a common crime".² A culprit may allege political motive as a cloak for the most detestable crimes in order to avoid punishment. In addition to this it is extremely difficult to distinguish between motive and intention.

The British Royal Commission on Extradition which was composed of eminent members of the English bench and bar, after a thorough study of the subject, recommended that such crimes as "attempts by conspirators to assassinate a reigning sovereign, regardless, perhaps, that in doing so other lives may be sacrificed; or by setting fire to prison, at the risk of burning all those within it, or the murder of the police for the purpose of rescuing prisoners in custody for political offences" should not be excluded from extradition regardless of the political motive involved. The recommendation is apparently based upon the theory that the authors of atrocious crimes should not be protected from the consequences of their acts in spite of the political motive or purpose which prompted them. The commission further recommended that a demand for the surren-

¹ *Pratique criminelle des cours et tribunaux*, II, 24.

² *Traité théorique et pratique du droit pénal français*, I, 271.

der of a criminal should not be refused upon the mere allegation by the accused that the offence was committed for a political motive, if the act was otherwise a common offence, unless it occurred during a civil war or open insurrection.¹ Under such provision all offences committed in preparation for a civil war would not be protected. It is doubtful if the irregular bands of Mexican revolutionists which raided the border towns in Mexico in the eighties could be regarded as political offenders under this test. This recommendation of the commission would radically curtail the principle of political asylum.

At the meeting at Oxford of the Institute of International Law in 1880, resolutions were passed concerning political offenders.² The only new feature of these resolutions is the provision applying the usages of war as a test in determining whether or not the offence charged wears a political character. The resolutions also make it a condition precedent to the surrender of a fugitive that the demanding state gives assurance that he would not be tried by extraordinary courts. At the subsequent session at Geneva in 1892, the Institute passed the following resolutions³ modifying the Oxford resolutions:

13. Extradition is inadmissible for purely political crimes or offences:

Nor can it be admitted for unlawful acts of a mixed

1 *Report of the Royal Commission on Extradition*, London, 1878.

2 "XIV. The state upon which the requisition is made decides without appeal, in accordance with the circumstances, whether the act for which the extradition is demanded; is, or is not, of a political nature.

"In this decision it ought to be guided by the two followning rules:—

"a. Acts which contain all the characteristics of crimes under the ordinary law (murder, arson, theft) should not be exempted from extradition solely by reason of the political intention of their authors.

"b. In weighing the acts committed in the course of a political rebellion, an insurrection or a civil war, it must be asked whether they would, or would not, be allowed by the customs of war.

"XV. In every case, extradition must not be granted for a crime which has at the same time the nature of a political crime and of a crime under the ordinary law, unless the state making the requisition gives the assurance that the person surrendered shall not be tried by exceptional courts. Moore, *Extradition*, I, 313, note; for French text, see *Annuaire*, V, 128-129.

3 For English version, see Westlake, *op. cit.*, part I, 256-257; J. B. Scott, *Resolutions of the Institute* pp. 102-103; for French text, see *Annuaire*, XII, 182-183.

character or connected with political crimes or offences, also, called relative political offences, unless in the case of crimes of great gravity from the point of view of morality and of the common law, such as murder, manslaughter, poisoning, mutilation, grave wounds inflicted willfully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and grave robbery, especially when committed with arms and violence.

So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its cause, they cannot give occasion to extradition unless they are acts of odious barbarism or vandalism forbidden by the laws of war, and then only when the civil war is at an end.

14. Criminal acts directed against the bases of all social organisation, and not only against a certain state or a certain form of government, are not considered political offences in the application of the preceding rule.
15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the demanding state gives the assurance that the person surrendered shall not be tried by extraordinary courts.

The insufficiency of the subjective test of motive and intention has already been pointed out. Some advocate the separation of the political from the common element.¹ This is possible only in case of two distinct acts. It is inapplicable to cases that ordinarily come up in court. If, for instance, A, leader of a revolutionary movement, in the course of an attack, rapes the daughter of B, the crime of rape committed by him has certainly nothing to do with the revolution and he may be surrendered without violating the principle of political asylum. Separation works out well in this case. But take the more intricate case of the robbery of the bank by Ezeta. It was shown that he did not rob the bank for his personal benefit but to obtain funds with which to pay the soldiers who were becoming mutinous because they were not paid. In this case the robbery was so inextricably connected with the struggle that separation could not be accomplished without doing violence to the principle of political asylum. In the case of Pelissier who sold French military secrets to another power and who was accused of theft by France, Belgium surrendered him upon the promise that he would only be tried for theft

¹ Fauchille has summed up these various systems in his *op. cit.*, I, 1017-1019.

and not for desertion, thus separating theft from desertion. This is sound practice, but Pelissier by taking away these documents and selling them to a foreign state rendered himself guilty also of treason. Treason and theft were inseparable. The better opinion is expressed in the decision of Austria refusing the demand of Italy for the surrender of Pozzi who was accused of a similar offence.¹

Another test is that laid down by the court in the case of Castioni; namely, an offence is political if it is incidental to and forms part of political disturbances. This is called by some writers the system of "causality" or the Anglo-American system. This test has been criticized as being too broad and too narrow at the same time. It is too broad in that it might include all kinds of offences committed during a civil war. On the other hand, it is too narrow because there are other types of political offences which may be committed in times of peace for which surrender should not be made. The Koster case and the Malatesta case are of this type.

The Institute of International Law has adopted the theory that even if the acts were committed in furtherance of a civil war, if "they are acts of odious barbarism or vandalism forbidden by the laws of war" their authors should be surrendered. While this theory from the moral standpoint is irreproachable, its application is not free from difficulties. In the first place there is no analogy between international wars and civil wars. The formula might work satisfactorily in the case where the rebellion has assumed such proportions as the War of Secession and where the rebels are treated as belligerents by the government. But even in such cases what might be acts of vandalism if viewed from the intrinsic nature of the acts without reference to the surrounding circumstances might be justified as retaliatory measures. If the facts are presented without any attempt at concealment of the attending circumstances by the demanding government, no serious difficulty will be in the way of arriving at a reasonably just conclu-

¹ Laire, *op. cit.*, p. 231.

sion. Almost invariably the offended state is particularly careful not to reveal in the requisition the revolutionary origin of the offence charged in order to secure the return of the fugitive.

At the hearing before Judge Smith on the application of the St. Albans raiders for a writ of *habeas corpus*, Lieutenant Young testified: "My heart is opposed as most others to measure of retaliation, but I have suffered so many hardships and endured so many privations in the cause of liberty and freedom, that my heart is steeled against sympathy for the invaders and oppressors of my beloved, my native land. Fresh from scenes of devastated firesides and ruined villages, and listening so lately to the wail of the widow and cry of the orphan; when I behold the ruin and devastation which marks the track of the Federal troops can any one wonder that the fire of revenge and retaliation should slumber within my bosom and only need the opportunity to burst into flames."¹ They were accused of murder and robbery by the United States government. Tested by the formula of the Institute, these offences would clearly fall under Article 13 of the Geneva resolutions and, therefore, extraditable if the surrounding circumstances were not considered. But supposing this statement of Young were true, could Judge Smith hold them responsible for those acts because they were in violation of the laws of war while the Federal forces were having their own way without favoring the Federal side?

The case that ordinarily comes up in court is the result of insurrectionary movements of lesser magnitude where the revolutionists are treated not as belligerents but as ordinary criminals. The revolutionists are often at a great disadvantage. To kill a guard might be an effective way of starting an insurrection, and robbery of a public treasury, as in the Keresselidzé case, would certainly swell the coffer with which to finance a revolutionary enterprise. Under the test laid down by the Institute all such acts would come under the category of common offences. The

¹ L. N. Benjamin, *The St. Albans Raid*, pp. 170-171.

formula would therefore radically restrict the principle of political asylum. We should not put a premium upon revolutions but, at the same time, we cannot, to use the language of Judge Hawkins, "look too hardly and weigh in golden scales the acts of men hot in their political excitement." Said Mr. Silva from Colombia:

In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. My distinguished colleague General Cazañaño (of Ecuador) knows how we carry on wars. A revolutionist needs horses for moving, beef to feed his troops, etc., and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his force, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it.¹

Another objection to the formula of the Institute is that the usages of war are too uncertain to furnish any definite criterion.

The experience of Switzerland in extradition matters is interesting. Of the cases decided by the Federal Tribunal, Langhard only disapproved of the Keresselidzé decision.² Article 10 of the law of January 22, 1892, empowers the Federal Tribunal to decide cases involving the surrender of political offenders and laying down general rules for determining the nature of the offence charged. It provides that:

Extradition shall not be granted for political offences. It shall not be granted even when the accused should allege a political motive or purpose, if the act for which it is demanded constitutes principally a common offence. The Federal Tribunal shall judge freely the character of the offence according to the facts of each particular case.

When the extradition shall be accorded, the Federal Council shall impose the condition that the person whose extradition is demanded shall neither be prosecuted nor punished for a political offence nor for his political motive or intention.³

The Swiss system is generally known as the system of

¹ *International American Conference*, vol. 2, 615.

² Langhard, *op. cit.*, p. 71.

³ *Recueil Officiel*, N. S. XII (1891-1892), p. 783.

"predominance." It was Ortolan,¹ a French criminalist, who originated the idea. The gist of the system is that the two elements of the offence—the common and the political—must be weighed and compared. If the political element predominates over the common element, the latter, is absorbed in the former and the offence is political. The system has been criticized on the ground that in the case of a relative political offence, which is composed of two distinct elements, there is no common basis for comparison. It is perhaps unfair to assert that the Swiss Federal Tribunal has been guided solely by this consideration. As a matter of fact it had taken into consideration all the surrounding circumstances of each particular case that came before it for decision.

A somewhat different approach is made by criminologists like Lombroso and Garofalo.² Without going into the causes of the physical phenomenon called revolution, Lombroso's theory in the main is that political crimes are found only in the abortive attempts to overthrow established authority such as seditions and riots. Revolutions are distinguished from other forms of political disturbances by the success of the enterprise, which reminds one of the saying:

Treason can never prosper—what's the reason? If it does prosper, none dare call it treason.³

In determining whether or not an offence is of a political character, he adopted an objective criterion. Thus he de-

1 According to this French penalist, in order to determine whether or not an act is political we should ask the questions: Which of the two elements is the more grave? Is it the political or the common? Which constitutes the greatest peril to society, and consequently the greatest interest to repression, the political or the nonpolitical element? If the political right and interest are the more conspicuous, the offence is political. Otherwise, it is not political. Ortolan, *Éléments de droit pénal* (Paris, 1875), I, 311. See also Billot, *op. cit.*, pp. 104-105; Vazelles, *Etude sur l'extradition*, p. 68. This criterion has been adopted in the law of Brazil of June 28, 1911, which provides: "Art. 2. The allegation of a political end or purpose shall not prevent the extradition, when the act constitutes principally an ordinary infraction of the penal law." *Collecção das leis da Republica de Estados Unidos de Brazil*, vol. I, 28.

2 Lombroso and Laschi, *Le crime politique et les revolutions*, trans. by A. Bouchard (Paris, Alcan's s. 1892, I, ch. 4: II, ch. 2, pp. 251-253, 260; Gustavo Tosti, *loc. cit.*, XIV, 405; Garofalo, *Criminology* (Modern Criminal Science S.) pp. 37-39.

3 Quoted by Sir James Stephen in his *History of the Criminal Law of England*.

finer a political offence as "every violent injury of the right constituted by the majority, for the maintenance and respect of the political, social and economic organization decided by it." What those rights of the majority are, will be difficult to determine. Garofalo's theory is that a crime is not political whenever murder and theft (natural crimes) are committed regardless of the purpose of the actor. Inasmuch as no revolution happens without some common crimes being perpetrated, political asylum would be restricted only to the so-called pure political offences. In the actual administration of international criminal justice little consolation can be derived from such theories.

The prevailing legalistic view has been severely criticized in a recent article by Mr. Schroeder.¹ He proposes to deal with the problem by the application of what he terms the "social motive" as a criterion for determining the character of an offence. This "social motive", he tells us, can be discovered by "psychologic inquiry and observation." He sees no reason why an anarchist or a Nihilist should not be judged by the same legal standard as an Irish nationalist or a Mexican revolutionist. His theory is open to criticism. In the first place, we do not get rid of the troublesome task of definitions. What is a "social motive"? This will likely create a divergence of opinion. In the second place, it will be equally difficult to determine the presence of social motive. An objection of more serious character is that which concerns its practical application. Let us take a concrete case. A, a radical socialist, assassinates B, a capitalist, in the honest belief that his action will improve the lot of working men. A then may be said to have a social motive. It logically follows, according to Mr. Schroeder's theory, that A is guilty of a political offence and therefore he may not be extradited. The fact should not be lost sight of that in extradition the only alternative to surrender is freedom. Will it be maintained that A should entirely escape punishment? We can understand the humane idea behind the theory. And we believe that A,

¹"Political Crimes Defined", *Michigan Law Review*, XVIII 1919), 30.

though he is a misguided doctrinaire, should not be treated on equal footing with those who commit like offences for private vengeance. In municipal law this fact should be taken into consideration as a mitigating circumstance. But this is different from saying that a radical socialist who perpetrates a crime because he honestly believes that the cause of socialism is thereby promoted should be treated as a political offender and therefore entirely escape punishment. States are not yet prepared for it.

CHAPTER VI

THE DEMANDED EXTRADITION OF WILLIAM II OF HOHENZOLLERN

A unique extradition demand was that made by the Allied and Associated Powers upon Holland at the conclusion of the World War for the surrender of the ex-German Emperor. The charges against him and the procedure for his trial are contained in Article 227 of the Treaty of Versailles which reads:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

It is not the purpose of this essay to discuss in detail the penal liability which attaches to the violation of the laws and customs of war. This is a subject broad enough for a separate investigation. It has provoked a lively discussion among writers on international law.¹ However,

1 James W. Garner, "Punishment of Offenders Against the Law and Customs of War", *Am. Jour. Int. Law*, XIV, 70 *et. seq.* This article contains abundant references, *Ibid.*, *Recent Developments in International Law*, Calcutta, 1922, p. 445 *et. seq.*; Hugh H. L. Bellot; "War Crimes, Their Prevention and Punishment", *The Grotius Society*, II, 30; Pitt Cobbet's *Leading Cases on International Law* (Bellot's ed.), II, 175; Quincy Wright, "The Legal Liability of the Kaiser", *The Am. Pol. Science Review*, XIII, 120; Theodore S. Woolsey, "Retaliation and Punishment", *Proceedings*, Am. Soc. Int. Law, IX, 62; George A. Finch, "Superior Orders and War Crimes", *Am. Jour. Int. Law*, XV, 440; *ibid.*, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes", *Am. Jour. Int. Law*, XIV., 218; "German War Trials", *ibid.*, XVI, 628; for texts of decisions, see *ibid.*, p. 674; *British Parliamentary Command Paper* No. 1450; Jesse S. Reeves, "Offenses Which May Be Characterized as International Crimes and Procedure for Their Prevention", *Proceedings*, Am. Soc. Int. Law, 1921, p. 62; *ibid.*; "International Criminal Jurisdiction", *Proceedings*, Am. Soc. Int. Law, 1921, p. 62; "Pre-

inasmuch as the liability of the ex-Emperor to surrender depends upon whether he committed an extraditable offence, an examination of this aspect of the question, even in a general way, is deemed necessary.

Article 227 of the treaty was the result of a compromise as President Wilson was opposed to any proceeding against the ex-Emperor.¹ Great Britain and France were set upon his punishment. Mr. Lloyd George was returned to Parliament in the postwar elections upon a program of a stern peace for the defeated enemy including the punishment of the ex-Emperor and those German officials who were guilty of infractions of the laws and customs of war. The great majority of the British and French authorities were unanimous in favor of bringing the ex-Emperor to justice and there were not wanting American authorities who supported their views.²

paration for Trial of the Former Kaiser", *New York Times Current History*, X (1919), 223; R. Floyd Clarke, "The Status of William Hohenzollern, Kaiser of Germany, Under International Law", *Am. Law Review*, 53, 401; J. B. Scott, "The Trial of the Kaiser" in *What Really Happened in Paris*, edited by E. M. House and Charles Seymour; C. A. Hereshoff Bartlett, "Liability for Official War Crimes", *Law Quarterly Review*, 35, 177; "Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties", *Am. Jour. Int. Law*, XIV, 95; *Phamphlet No. 32*, Division of International Law, Carnegie Endowment for International Peace, Washington, D. C.; Charles E. George, "Status of the Kaiser", *Chicago Legal News*, 51, 227; *ibid.*, "Editorial", *The Lawyer and Banker*, XII, 573; "The Trial of the Ex-Kaiser", *Virginia Law Register*, IV, n. s. 937; F. Larnaude and A. de Lapradelle, "Examen de la responsabilité pénale de l'empereur Guillaume II, d'Allemagne," *J. D. I. P.* 46, 181; A. Merignhac, "De la responsabilité pénale des actes criminels commis au cours de la guerre de 1914-1918", *R. D. I.* 47, 35; Dr. Walter Jellinek, "L'ex-Emperor d'Allemagne Guillaume II en Hollande", *J. D. I. P.* 46, 162; Edouard Clunet, "Les responsabilités civiles et pénales de l'Allemagne, *ibid.*, p. 720; Hyde, *International Law*, II, 846 *et. seq.*; Fenwick, *International Law*, (New York, 1924) p. 578 *et seq.*; Lansing, "Some Legal Questions of the Peace Conference," *Reports of American Bar Association*, XLIV, 248 *et seq.*; Lord Phillimore, "An International Criminal Court", *British Year Book of International Law* (1922-1923), p. 79; Address by Lord Cave on "War Crimes and their Punishment", *Transactions of the Grotius Society*, vol. 8 (1923), p. XIX; Hall, *A Treatise on International Law*, 8th ed. by A. Pierce Higgins, Oxford, 1924, p. 498; Puga y Acaí, M., "Las clausulas penales del tratado de paz de versalles", *Revista Mexicana de derecho internacional*, II, 82.

1 J. B. Scott, "The Trial of the Kaiser", in *What Really Happened in Paris*, edited by E. M. House and Charles Seymour, p. 237.

2 Professor Garner thinks it would have been more logical if the Conference, instead of charging the ex-Emperor with "a supreme offence against international morality and the sanctity of treaties", had accused him of common offences. *Am. Jour. Int. Law*, XIV, 92. Professor Wright remarked: "Trial of the Kaiser under international law by a tribunal whose jurisdiction was sanctioned by neutral

The penal liability of the ex-Emperor for the outrages committed by the German forces was the subject of an elaborate opinion by Dean Larnaude of the Law School of Paris and De Lapradelle, Professor of International law of the same institution, who were consulted by the French government on the matter.¹ The above provision of the treaty adopted in principle the recommendations of the Commission on Responsibilities. The recommendation, however, of that body for the trial of the ex-Emperor for offences against the laws and customs of war was finally abandoned. This is in accord with the dissenting opinion of the American members of the Commission opposing the placing of the ex-Emperor on trial as that would violate the universally recognized principle of international law relating to immunity of sovereigns from suits.² This immunity not only protects actual heads of states,³ but also ex-head of states for acts committed in their former sovereign capacity.⁴ The reason for the rule is nowhere better stated than by Chief Justice Marshall in the *Schooner Exchange v. McFaddon*.⁵ To subject the ex-Emperor to the jurisdiction of a foreign tribunal would be a denial of sovereignty. The view held by the majority of the Commission finds support in Vattel:

Humanity revolts against a sovereign, who, without necessity or without very powerful reasons, lavishes the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them

states, including that in which he was seeking asylum, as well as by the principal belligerents, would avoid the difficulties of jurisdiction, sovereign immunities and extradition, and would offer the greatest probability of a decision at once just and expedient." *The Am. Pol. Science Review*, XIII, 128. R. Floyd Clarks, "The Status of William Hohenzollern, Kaiser of Germany, Under International Law", *Am. Law Review*, 53, 401; "The Trial of the ex-Kaiser", *Virginia Law Register*, IV n. s., 937.

1 *J. D. I. P.*, vol. 46, 131 *et. seq.*

2 *Am. Jour. Int. Law*, XIV, 135.

3 *De Haber v. Queen of Portugal*, 17 Q. B. 196 (1851); *Schooner Exchange v. Mc Faddon*, 7 Cranch, 116 (1812); *The Duke of Brunswick v. The King of Hanover*, 2 H. L. Cases 1 (1848); The case of McLeod, Webster's Works, v. 116 *et seq.*; *Mighell v. Sultan of Johore*, 1 Q. B. 149 (1894); Quincy Wright, "The Legal Liability of the Kaiser," *The American Political Science Review*, vol. XIII, 121.

4 *Hatch v. Baez*, 7 Hun. 596; *Underhill v. Hernandez*, 26 U. S. App. 572 (1895).

5 7 Cranch, 116.

in the enjoyment of an honourable and salutary peace. And if to this imprudence, this want of love for his people, he moreover adds injustice towards those he attacks,—of how great a crime, or rather, of what a frightful series of crimes, does he not become guilty!"¹

Further on he said:

Nations that are always ready to take up arms on any prospect of advantage, are lawless robbers: but those who seem to delight in the ravages of war, who spread it on all sides, without reasons or pretexts, and even without any other motive than their own ferocity, are monsters, unworthy the name of man. They should be considered as enemies of the human race, in the same manner as, in civil society, professed assassins and incendiaries are guilty, not only towards the particular victims of their nefarious deeds but also towards the state, which therefore proclaims them public enemies. All nations have a right to join in a confederacy for the purpose of punishing and even exterminating those savage nations.²

The foregoing view is not shared by Grotius who believes that the sovereign who embarks upon an unjust war, though he may be responsible to his own subjects, cannot be held accountable for any injury done to his enemy.³ Unhappily the doctrine laid down by Grotius still prevails.

Moreover there was then no rule of international law making the alleged breaches of the laws and customs of war crimes with penalties attached for the violation thereof. Article 227 of the treaty, being *ex post facto* in character, is opposed to the modern conception of penal justice. However grave those offences might have been they were not legal but moral offences. It is true that Germany is one of the signatory powers to the Hague Conventions of 1889 and 1907 which prohibit the atrocious acts alleged to have been committed by her armed forces during the war, but no sanction was provided for the violation of the said rules, the observance of which was left to the good faith of the signatory powers. It might be remarked parenthetically that a new method of approach to the solution of this pro-

1 *The Law of Nations*, book III, ch. 3, 301.

2 *Ibid.*, book III, ch. 3, 304-305.

3 *De Jure Belli ac Pacis*, II, ch. 24, 7; Wright, "The Legal Liability of the Kaiser", *Am. Pol. Science Review*, XIII, 126.

blem is made by the Treaty of Washington (Article III)¹ in which it is stipulated that attacks upon and the seizure and destruction of merchant ships shall be considered as piratical acts and the offender shall be treated as such regardless whether or not he acted under superior orders. How the formula will work out remains to be seen. As the ex-Emperor was charged with offences of an entirely different kind in the treaty, the charges for breaches of the laws and customs of war having been finally abandoned, we need not dwell further upon this aspect of the question.

If the former Emperor could not be tried for infractions of the laws and customs of war because some legal technicalities stood in the way, some scheme had to be devised by which he could be punished for his misdeeds. So he was charged under the treaty with "a supreme offence against international morality and the sanctity of treaties." He was to be tried before a special tribunal composed of five judges representing the principal Allied and Associated Powers (The United States, Great Britain, France, Italy, and Japan). The treaty provided further that the court in its decision was "to be guided by the highest motives of international policy". The court was empowered to impose upon the ex-Emperor, should he be found guilty, any punishment it saw fit.²

It should be observed that the Commission on Responsibilities advised against the institution of criminal proceedings against the ex-Emperor for having caused the late war or for the violation of the neutrality of Belgium and Luxemburg. In the latter case the Commission recommended, however, that in view of the gravity of the act, the responsible authorities of Germany, especially the ex-Emperor, should be formally condemned by the Conference.³ This recommendation is inconsistent with the conclusion arrived at by the majority of the Commission that "it would be right for the Peace Conference, in a matter so

1 *Treaties, Conventions, &c.* III, 3118.

2 Compare Prof. Garner, *op. cit.*, p. 91.

3 *Am. Jour. Int. Law*, XIV, 120.

unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts." The inconsistency of this conclusion with the other recommendation of the Commission was justly criticized by the American members of that body. The arguments adduced in support of the recommendation that the acts which brought about the war as well as the violation of the neutrality of Belgium and Luxemburg are sound and the American members were in accord with them. It was not then a crime to declare war against a nation. Neither was there any rule in international law declaring the violation of a treaty engagement an offence and providing a penalty therefor. However outrageous the violation of the neutrality of Belgium and Luxemburg by Germany might have been from the moral standpoint it could not give rise to criminal proceedings. Not only did the treaty expressly accuse the ex-Emperor of moral offenses but that the charge of having committed an offence against "international morality" was extremely vague. The same criticism made by the American members of the Commission of the majority report for invoking "the laws of humanity" might be applied to "international morality." To quote the language of the dissenting opinion: "A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral laws and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."¹

Dr. James Brown Scott is of the opinion that the action contemplated by the treaty was of a political and not of a criminal character.² The Conference made this clear in a note to Holland. But whether the action contemplated was

¹ *Am. Jour. Int. Law*, XIV, 144.

² House and Seymour, *op. cit.*, p. 256; Lansing, "Some Legal Questions of the Peace Conference," *Reports of American Bar Association*, XLIV, 254.

judicial or political insofar as Holland was concerned her duty in the premises was not thereby affected. It may be remarked, however, that no reason is perceived for giving legal form to such a proceeding. When a person is condemned in advance, to give him "the guarantees essential to the right of defence" would seem a mockery of justice.

But the Allied and Associated Powers must first get hold of the ex-Emperor before he could be tried. It will be recalled that he fled to Holland and there abdicated. The question arose: Will Holland deliver him up? On January 16, 1920, the Secretary-General of the Peace Conference sent a note¹ to the Dutch minister signed by Clemenceau calling the attention of the Dutch government to Article 227 of the Treaty of Versailles and advising that Government of the desire of the Allied and Associated Powers to execute the provisions of the said article without delay. In

1 "In notifying by these presents the Netherlands Government and Queen of the text of Article 227 of the Treaty of Versailles, a certified copy of which is annexed, which came into force January 10, the powers have the honor to make known at the same time that they have decided to put into execution without delay this article.

"Consequently, the Powers address to the government of the Netherlands an official demand to deliver into their hands William of Hohenzollern, formerly emperor of Germany, in order that he may be judged.

"Individuals residing in Germany against whom the allied and associated powers have brought charges are to be delivered to them under Article 228 of the peace treaty, and the former Emperor, if he had remained in Germany, would have been delivered under the same conditions by the German Government.

"The Netherlands Government is conversant with the incontrovertible reasons which imperiously exact that premeditated violations of international treaties, as well as systematic disregard of the most sacred rules and rights of nations, should receive as regards every one, including the highest placed personalities, special punishment provided by the Peace Congress. The powers briefly recall, among so many crimes, the cynic violation of the neutrality of Belgium and Luxemburg, the barbarous and pitiless system of hostages, deportation *en masse*, the carrying off of young girls from the City of Lille, who were torn from their families and delivered defenseless to the worst promiscuity; the systematic devastation of entire regions without military utility, the submarine war without restriction including inhuman abandonment of victims on the high seas, and innumerable acts against noncombatants committed by German authority in violation of the laws of war.

"Responsibility, at least moral, for all these acts reaches up to the supreme head who ordered them, or made abusive use of his full powers to infringe, or to allow infringement, upon the most sacred regulations of human conscience.

"The Powers cannot conceive that the government of the Netherlands can regard with less reprobation than themselves the immense responsibility of the former Emperor.

the note the surrender of William II of Hohenzollern was formally demanded in order that he might be put on trial. The note recited the numerous atrocities committed by the German forces for which the ex-Emperor was at least "morally" responsible. Then it reminded Holland of her duty to make common cause with the Allied and Associated Powers in bringing the ex-Emperor to justice. The attention of the Dutch government was further invited to the fact that the action contemplated was not of a judicial character and therefore legal *argutie* would have no place, but "an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognized in public law." The note expressed the confidence of the Allied Governments that Holland would not grant the royal fugitive asylum within her territory. The Dutch government was further told that it would be to the highest interest of the Dutch people not to appear as affording protection to the ex-Emperor, but to facilitate his trial. According to Professor Merignhac¹ the Dutch government upon receipt of the note sought the advice of the leading Dutch jurists, who, in turn, had a consultation with

"Holland would not fulfill her international duty if she refused to associate herself with other nations as far as her means allow in undertaking or at least not hindering chastisement of the crimes committed.

"In addressing this demand to the Dutch Government, the powers believe it their duty to emphasize its special character. It is their duty to insure the execution of Article 227 without allowing themselves to be stopped by arguments, because it is not a question of public accusation with juridical character as regards its basis, but an act of high international policy imposed by the universal conscience, in which legal forms have been provided solely to assure to the accused such guarantees as were never before recognized in public law. The powers are convinced Holland, which has always shown respect for the right, and love of justice, having been one of the first to claim a place in the Society of Nations, will not be willing to cover by her moral authority the violation of the principles essential to the solidarity of nations, all of which are equally interested in preventing the return of a similar catastrophe.

"It is to highest interest of the Dutch people not to appear to protect the principal author of this catastrophe by allowing him shelter on her territory, and also to facilitate his trial, which is claimed by the voices of millions of victims". (New York Times, Jan. 20, 1920. For French text, see Merignhac, "De la responsabilité pénale des actes criminels commis au cours de la guerre de 1914-1918", *R.D.I.* vol. 47, p. 37; Laurens *De l'extradition en matière politique*, Paris, 1921 p. 107 *et. seq.*)

1 *R.D.I.* 47, p. 40.

Clunet, the lamented master of the science of international law and who will forever be remembered by the numerous readers of his splendid journal of which he was the founder and editor. His opinion, which was published in the *Intran-sigeant* of January 17, 1920, upheld the contention of the Dutch government in refusing to surrender the former Emperor. When some one suggested in the early stages of the war that a clause should be inserted in the treaty of peace providing for the surrender of the principal offenders against the laws and customs of war by the enemy, the late Professor Renault thought that the proposition was unreasonable.

In its reply¹ dated January 24, 1920, to the Allied note, the Dutch government called attention to the fact that Holland was not a party to the Treaty of Versailles and therefore she would have to determine for herself her own duty in the premises. It denied the existence of an international duty of cooperating with the Allied and Associated Powers in the act of "high international policy" and suggested that if in the future there should be established an international tribunal competent to judge the so-called war crimes then it would be the duty of Holland to join the new

1 "By a verbal note, dated Jan. 15, 1920, given to the envoy of the Queen at Paris, the Powers, referring to Article 227 of the Treaty of Versailles, demanded that the Government of Holland give into their hands William of Hohenzollern, former Emperor of Germany, so that he may be tried.

"Supporting this demand, they observe that if the former Emperor had remained in Germany the German Government would, under the terms of Article 228 of the Treaty of Peace, have been obliged to deliver him.

"In citing as premeditated violations of international treaties, as well as a systematic disregard of the most sacred rules of the rights of man, a number of acts, committed during the war by German authority, the powers place the responsibility, at least morally, upon the former Emperor.

"They express the opinion that Holland would not fulfill her international duty if she refused to associate herself with them, within the limit of her ability, to pursue, or at least not to impede, the punishment of crimes committed.

"They emphasize the special character of their demands, which contemplate, not a juridical accusation, but an act of high international policy, and they make an appeal to Holland's respect of law and love of justice not to cover with her moral authority violation by Germany of the essential principles of the solidarity of nations.

"The Queen has the honor to observe, first, that obligations which for Germany could have resulted from Article 228 of the Treaty of Peace cannot serve to determine the duty of Holland, which is not a party to the treaty.

regime. In connection with this suggestion of Holland, the Advisory Committee of Jurists which met at the Hague to draft the statute of the Permanent Court of International Justice approved a resolution introduced by its chairman, Baron Descamps, recommending that the court be given jurisdiction to try international criminals. The Assembly of the League, however, failed to act upon the matter.¹ "The Government of the Queen", continues the note, "cannot admit in the present case of any other duty than that which the laws of the kingdom and national tradition impose upon it. Now, neither the constituent laws of the kingdom which are based upon the principles of law universally recognized nor a respectable secular tradition which has made this country always a ground of refuge for the vanquished in international conflicts, permit the Government of Holland to defer to the desire of the powers by withdrawing from the former Emperor the benefit of its

"The Government of the Queen, moved by imprescriptible reasons, cannot view the question raised by the demand of the Powers except from the point of view of its own duty. It was absolutely unconnected with the origin of the war and has maintained, and not without difficulty, its neutrality to the end. It finds itself then face to face with facts of the war in a position different from that of the powers.

"It rejects with energy all suspicion of wishing to cover with its sovereign right and its moral authority violations of the essential principles of the solidarity of nations, but it cannot recognize an international duty to associate itself with this act of high international policy of the powers.

"If in the future there should be instituted by the society of nations an international jurisdiction, competent to judge in case of war deeds, qualified as crimes and submitted to its jurisdiction by statute antedating the acts committed, it would be fit for Holland to associate herself with the new regime.

"Now, neither the constituent laws of the kingdom, which are based upon the principles of law universally recognized, nor a respectable secular tradition which has made this country always a ground of refuge for the vanquished in international conflicts, permit the Government of Holland to defer to the desire of the powers by withdrawing from the former Emperor the benefit of its laws and this tradition.

"Justice and national honor, of which respect is a sacred duty, oppose this. The Netherlands people, moved by the sentiments to which in history the world has done justice, could not betray the faith of those who have confided themselves to their free institutions.

"The Government of the Queen is pleased to believe that the powers will recognize the good grounds of these considerations, which rise above any consideration of personalities and which seem to it so peremptory that they could not reasonably give rise to wrong interpretations. (*The New York Times*, Jan. 24, 1920, p. 1. For French text, see *R.D.I.* vol. 47, p. 39; Laurens, *op. cit.*, p. 109).

1 Lord Phillimore, "An International Criminal Court and the Resolutions of the Committee of Jurists," *B. Y. S. I.* 1922-1923, p. 79 *et. seq.*

laws and this tradition." To accede to the Allied demand would be a betrayal of "the faith of those who have confided themselves to their free institutions."

The reply of the Dutch Government was not satisfactory to the Supreme Council. A second note¹ was sent to Holland by the council of ambassadors on February 15, 1920. It was couched in a milder tone and expressed the regret of the Allied and Associated Powers that Holland could not see her way clear to acquiesce in the Allied demand. It pointed out that the demand was made in the name of twenty five nations signatories of the treaty of peace and therefore Holland could not disregard the collective force of the said request without placing herself be-

1 "The immense sacrifices made in the general interest by the powers during the war entitle them to ask the Netherlands to reconsider its refusal, based on the weighty, but entirely personal, considerations of a state which held aloof from the war and cannot perhaps appreciate quite accurately all the duties and dangers of the present hour.

"The obligations of the powers toward other nations, the gravity of the question concerned, as well as the very grave political effects to which relinquishments of the claims of justice against the ex-Emperor would give rise, all constrain them to uphold and renew their demand.

"The powers do not ask the Queen's Government to depart from its traditional policy, but to consider that the nature of their request—which does not in their opinion, depend solely, or even mainly, on Dutch municipal law—has not been adequately appreciated.

"No question of prestige is at stake, and the powers pay as much heed to the conscientious sentiments of a State with limited interest as to the mature decision of great powers, but cannot wait for the creation of a world tribunal competent to examine international crimes before bringing to trial the responsible author of the catastrophe of the great war.

"It is precisely this contemplated trial which would prepare the way for such a tribunal and demonstrate the unanimity of feeling animating the conscience of the nations of the world. The powers wish to point out that the League of Nations has not yet reached a state of development sufficient to allow any application to it, or to a tribunal of any kind created by it, meeting with that prompt satisfaction which is surely essential.

"Would not the refusal of the Government of the Queen to deliver up the ex-Emperor, should it be persisted in, create an unhappy precedent tending to render inefficient the procedure of every international tribunal against highly placed criminals? The Government of Holland alleges that the demand for the surrender of the ex-Emperor cannot be considered by it except from the point of view of its own duties. (This part is omitted in the text published in the *New York Times*.)

"It does not appear to consider that it shares with other civilized nations the duty of securing the punishment of crimes against justice and the principles of humanity—crimes for which William of Hohenzollern undeniably bears a heavy responsibility.

"The note of Jan. 15 was sent in the name of the Allies, twenty-five in number, who were signatories to the treaty of peace and the collective mandataries of

yond the comity of nations. It reiterated the numerous atrocities committed by the German forces during the war and expressed surprise in not finding in the reply of Holland even a single word of disapproval of those crimes when so many of her citizens had been innocent victims of the German submarine warfare. It also warned Holland that she would incur a heavy responsibility if she should allow the former Emperor to reside so near the German frontier where he could be the center of political intrigues so dangerous to European peace.

Holland was adamant. On March 6, 1920, she replied

a majority of the civilized nations of the world. It is impossible to disregard the collective force of this request, which is the expression not only of the feeling of indignation of the victims, but of the demand for justice made by the conscience of humanity as a whole.

"The Netherlands Government surely has not forgotten that the policy and personal actions of the man required for judgment by the powers have cost the lives of approximately 10,000,000 men, murdered in their prime, and have been responsible for the mutilation or shattered health of three times as many, the laying waste to and the destruction of millions of square miles of territory in countries formerly industrious, peaceable and happy, and the piling up of war debts running into billions, the victims being men who had defended their freedom, and incidentally that of Holland.

"The economic and social existence of all these nations has been thrown into confusion, and they are now jeopardized by famine and want—the terrible results of that war of which William II was the author.

"The Allies cannot conceal their surprise at finding in the Dutch reply no single word of disapproval of the crimes committed by the Emperor, crimes which outrage the most elementary sentiments of humanity and civilization, and of which in particular, so many Dutch nationals themselves have been the innocent victims on the high seas. To help bring to justice the author of such crimes plainly accords with the aims of the League of Nations.

"How can any one fail to be impressed by the reactionary manifestations which have followed the refusal of Holland, and the dangerous encouragement to all those who are opposing the just chastisement of the culprits and their exemplary condemnation, whatever their social position.

"Holland, whose history tells of long struggles for liberty, who has suffered so grievously through disregard for justice, could not place herself by such a narrow conception of her duties outside of the comity of nations. A duty, which none can avoid for national reasons, however weighty they may be, is to unite in order to mete out exemplary punishment to responsible authors of the disasters and abominations of the war and endeavor to revive conceptions of solidarity and humanity in the German nation, which is still unconvinced of the falsity of the tenets of its Government, who professed that might was right and success condoned crime.

"It was from this point of view, and not exclusively from a national standpoint, that the powers requested the Government of the Queen to hand over William of Hohenzollern, and from this point of view they now renew that request. The powers desire to remind the Government of the Netherlands that if it should persist in its attitude of detachment toward the presence of the imperial family on its territory so close to Germany it would assume direct responsibility both for shelter-

to the second Allied note.¹ The reply was short and to the point. She maintained that compliance with such a demand was "contrary to law and justice and incompatible with national honor." She was conscious of the duty which the presence of the royal fugitive on her soil imposes upon her, and that from the very beginning she had taken the necessary precautions in the free exercise of sovereignty by submitting the liberty of the former Emperor to the necessary limitations.

The refusal of Holland to surrender the ex-Emperor has been the subject of adverse criticism on the part of some

ing from the claims of justice and for that propaganda which is so dangerous to Europe and the whole world.

"It is indisputable that the permanent presence of the ex-Emperor, under ineffectual supervision, a few kilometers distance from the German frontier, where he continues the centre of active and increasing intrigues, constitutes for the powers who have made superhuman sacrifices to destroy this mortal danger a menace which they cannot be called upon to accept. The rights which they possess in virtue of the most express principles of the law of nations entitle them and make it their duty to take such measures as are required for their own security.

"The powers cannot conceal the painful impression made upon them by the refusal of the Dutch Government to hand over the ex-Emperor to them without any consideration of the possibility of reconciling the scruples of Holland with some effectual precautionary measures to be taken either on the spot or by holding the ex-Emperor at a distance from the scene of his crimes, making it impossible for him to exert his disastrous influence in Germany in the future.

"Although a proposal of this nature would not correspond fully to the request of the powers it would at least have afforded proof of those feelings which Holland cannot but possess.

"The powers urge upon the Dutch Government in the most solemn and pressing manner the importance attaching to fresh consideration of the question put before her. They desire that it may be clearly understood how grave the situation might become if the Netherlands Government were not in a position to give those assurances which the safety of Europe so imperatively demands." (*The New York Times*, Feb. 17, 1920, p. 3. For French text, see *R. D. I.* vol. 47, p. 42; Laurens, *op. cit.*, p. 115).

1 "The Government of the Queen, appreciating the motives by which the Powers are actuated, has again devoted the most serious attention to the considerations brought forward by them and has once again conscientiously examined its duty in the matter. It is unable, however, to arrive at any other conclusion than that outlined in its note of January 21, stating its inability to accede to the wishes of the Powers.

"The Government of the Queen is far from having forgotten the inhuman acts which occurred during the war, and against which it protested whenever Dutch subjects were the innocent victims. The Government considers that the memory of these outrages cannot influence its attitude in the present case. It points out that the Netherlands, which were not a party to the Treaty of Versailles, find themselves in a different position, with regard to war acts from that of the Powers. Since the supreme duty of the Government is to respect the constitutional laws

writers.¹ Not only was the demand unique in that the fugitive offender happened to be of royal blood, who, in the heyday of his career, was one of the most powerful chieftains of Europe, but that it was without precedent in the history of modern international relations.

We have remarked elsewhere in this essay that the so-called extradition among the ancients was limited to cases of what under the modern system might be denominated political offences. Dr. Phillipson in his scholarly work, *The International Law and Customs of Ancient Greece and Rome*, mentions the conspiracy to bring about war or rebellion, the violation of a treaty and the making of an unjust war upon a state as grounds for extradition. Thus, Livy tells us that Brutulus Papius was surrendered to the Romans by the Samnites after the latter's defeat as the principal author of the war. He avoided, however, the ig-

of the Kingdom, which are founded upon universally recognized principles, it can only emphasize the fact that, in these conditions, it would be committing an act contrary to laws and justice and incompatible with the national honour if it consented, at the request of the Powers, to violate these laws by abolishing the rights which they accord to a fugitive finding himself within the country's territory.

"The Dutch Government doubts whether that conception of its duties would place the Netherlands outside the comity of nations, as is stated in the Note of February 14. The history of Holland, to which the Powers refer when they quote the disregard of justice by which Holland has suffered and her struggles for freedom, furnishes a strong protest against the accuracy of such a doctrine.

"If, therefore, the Government must adhere to the reply already given it is not less mindful of the duties which devolve upon it in connexion with the presence of the ex-Kaiser in the territory of the kingdom, as much from the point of view of the country's interests as that of international security. The Government regrets that the Powers appear to have been under the impression that, since the reply makes no reference to the latter point, the Government has lost sight of this side of the question and has not given serious attention to it. This is not so. Mindful of its duties in this connexion, the Government has, from the beginning, borne in mind the obligations imposed by its duties and will continue to do so, being in a position in the free exercise of Dutch sovereignty to take on the spot all necessary effective measures of precaution and to subject the freedom of the ex-Kaiser to necessary limitations.

"The Netherlands Government is anxious to place on record these declarations in the most formal manner possible, while making the views it has on its duties harmonize with its rights—It hopes that these declarations, which show that the Netherlands Government is alive to the dangers which the Powers apprehend, are of a nature to dispel their fears. (The *London Times*, March 6, 1920, p. 13; for French text, see *R. D. I.* vol. 47, p. 44; Laurens, *op. cit.*, 120).

1 Merignac, *op. cit.*, p. 47 *et. seq.*; Laurens, *op. cit.*, p. 103, *et. seq.*; compare Travers, *R. D. I.* vol. 48, p. 134; *ibid.*, *Le droit pénal international*, IV, 528.

nominious fate which awaited him by committing suicide.¹ Upon learning of the fall of Saguntum to the besieging forces of Hannibal, Rome sent an emissary to Carthage to demand the surrender of this redoubtable warrior of old. The government party would have granted the request but for a strong public opinion against Rome. Cato pleaded for the surrender of Caesar to the Germans for having waged an unjust war against them.² There were other instances of surrender of this sort in ancient times. These cases are most nearly akin to the demand for the surrender of the former Emperor. There is, however, this vital distinction. In antiquity the motive behind the surrender was rather the fear of collective penalty which a foreign state might impose upon another for in those early times punishment was often visited upon whole communities for the crimes of individuals.³ In the Treaty of Versailles the first definite attempt is made to fasten the responsibility for the war upon the head of a state. In the St. Albans Raid, there was an effort made by the counsel for the United States to invoke the fact of the breach of the laws and customs of war by Lieutenant Young and his command as a ground for extradition. This plea did not, however, succeed, Judge Smith holding that it was not for a neutral judge to decide that question.⁴ In the famous case of Arguelles,⁵ Secretary Seward invoked, in justification of the action of the executive in effecting the surrender of Arguelles in the absence of treaty stipulations with Spain or statutes, the fact that no state is bound to grant asylum to offenders against the human race.

Is the former Emperor a *hostis humani generis*? The Supreme Council thought he was. And a notable group of writers has resorted to this argument in urging his extradition.⁶ Declared Professor Berthelemy: "International law has stigmatized the crime of William II and we hardly

1 *Histoire Romaine* de Tite-Live, Paris, 1810, t. IV, liv. 8, 163, 165.

2 *Plutarch's Lives* (Trans. by Bernadotte Perin), vol. VIII, 359.

3 Grotius, *De Jure Belli ac Pacis*, II, ch. 21, sec. 2.

4 Benjamin, *The St. Albans Raid*, p. 458.

5 *Dip. Cor.* 1865, part 2, p. 60, part 4, p. 35.

6 Prof. Berthelemy in *Le Matin*, November 26, 1918; Prof. Castori in *Le Matin*, December 16, 1918; "The Trial of the Kaiser", *Virginia Law Register*, IV, n.s. 937; Merignac, *op. cit.*, p. 45; see also the opinion of the majority of the Commission on Responsibilities, *Am. Jour. Int. Law*, XIV, 116 *et. seq.*

understand that, stunned by the monstrosity of the crime, we may cavil concerning its juridical character when it is a question of reaching its author. There is no precedent! Let us therefore create and give this example to the world, not in the spirit of vengeance, but in the solicitude for justice, to punish mercilessly the authors responsible for the calamities which cause to pour so much blood and to flow so much tears. The Hohenzollerns have placed themselves beyond the pale of humanity. Woe to any one who, in order to protect them from punishment that the universal conscience demands, would pretend to shelter behind a vague legal principle supported by irrelevant quibblings." It is questionable whether besides piracy and slave trade there exists another type of offence against the human race. At least Holland did not consider the ex-Emperor as such an offender. The reservations made by the American and Japanese members of the Commission on Responsibilities in the report of that body did much to weaken, if not destroy, this argument. Surely there is a vast difference between a dealer in human commodities and the head of a state though the latter had been engaged in a ruthless warfare.

There is no question but that the decision of the Dutch Government is legally sound.¹ Some writers would seem to think that if the Supreme Council had charged the ex-Kaiser with common offences the Dutch government would have had no ground for refusing his surrender. We hardly think it would have influenced Holland in her decision. It might not have supplied her with a ready answer but the situation would have remained the same. The asylum state is never bound by the nomenclature the demanding state gives to the offence. It is at liberty to inquire into the nature of the charge whenever the extradition is ob-

1 Scott, "The Trial of the Kaiser" in *What Really Happened in Paris*, edited by House and Seymour; Garner, *Recent Developments in International Law*, p. 452; Charles E. George in *The Lawyer and Banker*, XII, 573; the German point of view is set forth by Professor Jellinek in 46 *J. D. I. P.* 162 *et. seq.* and Dr. Pe-tong in 47 *J. D. I. P.* 132 *et. seq.*; Professor Simons of the University of Utrecht approves the position taken by Holland, 46 *J. D. I. P.* 953; Clunet in an interview published in the *Intransigeant* of January 17, 1920, cited by Merignac in 47 *R. D. I.* 40; Travers 48, *R. D. I.* 134; *ibid.*, *Le droit pénal international*, IV, 528.

jected to on the ground of the political character of the offence. As a matter of fact in all cases involving political offences, the accused has always been charged with a common crime. Whether the action contemplated by the Conference was political or whether the former Emperor was charged with common offences, from the view point of extradition, the right of Holland to inquire into the character of the charge independently of what the Allied and Associated Powers might have thought of the royal fugitive cannot be challenged.

Some writers maintain that the application of the principle of the non-surrender of political offenders to the case of the former Emperor is erroneous inasmuch as the international practice has to do only with cases arising out of internal political disturbances. According to them even if the question is considered from the point of view of extradition, the case of the ex-Emperor should be treated as an exception to the rule as the acts committed by Germany during the war, if tested by the rules laid down by the Institute of International Law at the Oxford and Geneva sessions, would clearly fall under the head of common offences. Not only were those acts of "odious barbarism or vandalism forbidden by the laws of war" but were directed "against the bases of all social organization". The decision of Holland was, therefore, in absolute contradiction with the resolutions of the Institute.¹ In view of the fact that the charge for breaches of the laws and customs of war was finally dropped, the argument would seem beside the point. But assuming that the ex-Emperor was so charged, the argument appears highly strained. The resolutions of the Institute envisage civil not international wars and, therefore, have no application to the latter. Take, for instance, the rule which declares as extraditable offences acts directed against the bases of all social organization. There can be no doubt but that it is aimed at a particular kind of evil—the anarchistic activities. Even such an eminent writer as Professor Merignac maintains that the out-

¹ Merignac, *op. cit.*, p. 48 *et. seq.*; Laurens, *op. cit.*, p. 128 *et. seq.*; compare Travers, *R. D. I.* vol. 48, p. 132-133.

rages committed by the German forces come within the purview of this rule as it was discovered that it was Germany's intention to ruin Great Britain and France economically.¹ This is a novel point of view. Such an interpretation stresses the rule beyond what its framers really intended.

But if the principle of the non-surrender for political offences only applies to cases arising out of civil commotions why invoke it in the present case? It has been stated elsewhere that the rule is justified on the ground that no state has a right to meddle in the domestic affairs of another. This reasoning applies even with greater force to a neutral power. The extradition of the ex-Emperor would have been inconsistent with the duty of neutrality which Holland was bound to observe. Although the term "political offences" has acquired a somewhat definite meaning in international law it is still in the process of development and its possibilities have not as yet been exhausted. It is true enough that the majority of the decided cases are connected with internal political commotions, but a few decisions reveal other types of political offences. In the attempted extradition of the ex-Emperor we have still another type of case. The political character of the offence is implied from the very language of the treaty. He was accused of "a supreme offence against international morality, and the sanctity of treaties". The treaty also provides that in its decision the tribunal will be guided by the "highest motives of international policy". And then the Allied note of January 16, 1920, speaks of the demand as "not a question of a public accusation having a juridical character as its basis, but an act of high international policy."

Let us now turn to the definitions of political offences by leading French authors. According to the above-cited definition of Grivaz, political offences are of two kinds. Those which refer to the external policy, such as the independence of a nation and its territorial integrity and those which affect the internal political order. Similar defini-

1 *Op. cit.*, p. 49.

tions are given by Garraud, Vidal, Saint-Aubin, Travers, and others.¹ The first part of the above definition would seem to cover the charges against the former Emperor. Admitting for the sake of argument that the offence of which the ex-Emperor was accused was not of a political character in view of the precedents, it is likewise evident that, to quote again the exact language of the treaty, "a supreme offence against international morality and the sanctity of treaties", is not the kind of offence for which extradition is ordinarily stipulated in the treaties. And inasmuch as in the absence of a treaty there is no obligation incumbent upon the asylum state to surrender a fugitive offender, the refusal of Holland to extradite the ex-Emperor was entirely in harmony with international practice. Compliance with the demand of the Allied and Associated Powers was further rendered impossible by a provision in the organic law of Holland which provides that a fugitive offender can only be extradited for a treaty offence. The question has been discussed by Professor Simons of the University of Utrecht setting forth the Dutch point in view.²

Looking back over the episode, one cannot help feeling that the policy adopted by the Allied and Associated Powers towards their vanquished foe was ungenerous. The penalty clauses would only deepen the wound caused by the war and kindle in the hearts of the defeated enemy the fire of revenge. A wise judge once said: "A treaty of peace is, therefore, an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war."³ Had the victors in past international conflicts shown a more generous attitude towards the defeated enemies, the ideal of world peace might today be nearer realization. As it is now, all efforts to outlaw war are fruitless unless some means

1 Garraud, *Traité théorique et pratique du droit pénal français*, I, 3rd ed. 1913, p. 268, Vidal, *Cours de droit* 5th, ed. by Magnol, 1916, p. 110; Saint-Aubin, *L'extradition et le droit extraditionnel*, I, 407; Travers, *Le droit pénal international*, IV, 519.

2 *J. D. I. P.* vol. 46, p. 953.

3 Lord Stowell in the *Eliza Ann*. I Dodson's Reports, 249, quoted by Dr. Scott in House and Seymour, *op. cit.*, p. 231.

are found by which the injustices of the existing order, which weigh heavily upon some portions of the world's population, may be corrected by pacific methods.¹

CONCLUSION

It is difficult to draw a general conclusion as to what constitutes a political offence from conflicting precedents. Both the English and American courts and the Swiss Federal Tribunal have declined to give a definition of political offences preferring to deal with the matter as each case arises. On the whole the American courts have adopted a more liberal attitude towards political offenders than the Swiss Federal Tribunal. The latter denied asylum in all cases arising out of the revolutionary disturbances in Russia in 1905 except in the case of Keresseldzé and Magaloff. Even in this case the refusal of the court to extradite the accused was partly due to the insufficiency of the evidence establishing their guilt. The United States had, on several occasions, refused extradition on the same ground.

The adjudicated cases show that a political offence is not conditioned upon the existence of a revolution as there are types of political offences which may be committed in the absence thereof. However, in the majority of cases, the court has always inquired into the existence of a revolt and has refused asylum where it is shown that at the time of the commission of the act no uprising existed. The revolution need not be of vast size, and, according to a case, it may even be latent. As a matter of fact some of the uprisings resemble mere marauding bands. Under the Anglo-American doctrine it is sufficient for an act to be invested with a political character if it can be shown that it is incidental to the movement. The Swiss Federal Tribunal has gone farther than that. It has imposed upon the accused the burden of proving the direct relation between the act and the purpose of the party. The contrary doctrine obtains in the United States. Even if the act admittedly

¹ Walter Lippmann, "The Political Equivalent of War", *The Atlantic Monthly*, vol. 142, p. 181.

bears a political character to some extent, the common element may yet predominate and thus render the accused subject to extradition.

The following have been held political offences: (1) the killing of a government official in the course of a civil disturbance, (2) the hanging of a spy, (3) the putting to death of an officer who proved himself traitorous to his trust, (4) the robbery of a bank for the purpose of obtaining funds with which to pay the soldiers, (5) the robbery of a municipal treasury ordered by a revolutionary party (in the cases of Belenzow and Victor Gabrilow Wassilieff, the Swiss Federal Tribunal held, however, that robbery of private banks ordered by certain revolutionary parties in Russia was not a political offence), (6) an assault upon an abusive landlord where it was shown that it was a part of the larger movement against the existing economic and political systems, (7) the infraction of the law prohibiting membership in the association of malefactors, (8) abetment of perjury for the purpose of escaping punishment for the crime of *lese-majesté*, (9) mutiny aboard a warship where it appeared that the members of the crew had taken sides in the civil war then raging in the home country, (10) theft of military secrets, (11) arson of a dwelling house and the killing of the occupants thereof pursuant to the order of a revolutionary party as a penalty for having betrayed the revolutionists to the authorities (the Swiss Federal Tribunal has consistently denied asylum to those accused of similar offences), (12) complicity in an assault with intent to kill where it was shown to have been perpetrated during a general struggle, approaching a civil war, between political parties for control of the government, and (13) infractions of the laws of international morality and the sanctity of treaties.

It is no exaggeration to say that few subjects in international law have occasioned so much debate among the ablest jurists with so little result accomplished as the subject of political offences. Notwithstanding this apparent failure, however, some progress has been achieved. The

inclusion of murder of heads of states in the category of extraditable offences is beyond doubt a great step forward, although there might be an exceptional case in which a person who resorts to that means in order to accomplish his purpose ought to be treated as a political offender. Some countries have refused to insert the so-called *attentat* clause in their extradition treaties leaving to the court the power to decide the case according to the surrounding circumstances. The Swiss system, which is purely judicial, is perhaps an ideal arrangement if not for the fact that the courts ordinarily incline to conservatism.

Another distinct advantage is the rejection of motive or purpose as a conclusive test in the determination of the nature of the offence in the absence of conclusive evidence showing the existence of that motive or purpose. The traditional view that an offence is political if committed with a political motive or purpose in the sense above indicated no longer obtains. Although the motive or purpose of the actor is an important element to be considered it is not everything. Jurists have, therefore, resorted to objective tests, such as the existence of an uprising or of two parties or factions struggling for control of the government, the connection of the act with the uprising and its relation with the aim of the party to which the offender belongs, the nature of the right violated, the atrocity of the means employed and so forth.

The different policy of states, our divergent conceptions of government, and the diversity of penal legislation in the various countries,—in fact our varying degrees of civilization will always be an obstacle to the solution of the problem. In the nature of things no satisfactory definition of political offences can be formulated. Manifestly the imponderables cannot be embodied in any definition of political offences. An all-inclusive definition is unattainable even in private law. Judge Denman, in the leading case of *Castioni*, has observed that no definition of political offences can be framed broad enough to cover every case which might arise. His views find support in Moore, Bil-

lot, Fiore and others. The soundness of this proposition—though it has been severely criticized by Mr. Schroeder—is indisputable. Take, for instance, the Belenzow case. In our opinion the case was rightly decided. At the time of his arrest he was drunk and retained the lion's share of the loot which goes to show that his purpose was not wholly altruistic. Let us shift the facts a little. Suppose at the time of his arrest he had already distributed the entire proceeds of the booty among the revolutionary parties in Russia with which to finance the campaign against the Czarist regime. Under the circumstances the crime should be treated as political as there was absolutely no thought on his part of private gain. Take a more complicated case. Suppose instead of disposing of the whole amount of the booty in the manner suggested he retained some cash with which to defray the expenses of litigation at least should any trouble arise. Even then if it can be proved that this was his intention, the crime should still be held political. In those difficult cases the accused should be given the benefit of the doubt.

The only possible solution of the problem is to lay down general rules for the guidance of the authorities in handling the question. This will make for consistency and uniformity in the decisions. The best solution ever attempted, though it is by no means perfect, is that proposed by the Institute of International Law at Geneva. But as it has been pointed out the unqualified application of the rule to all cases irrespective of other considerations is likely to result in a flagrant injustice. If a despotic government, through sheer brutality, has forced the revolted subjects to adopt a similar course, it is not for the asylum state to say that the latter are not justified in resorting to terrorism, as Mr. Julian W. Mack has well said: "Some maintain that assassination, as distinguished from killing in open warfare, is necessarily a non-political crime. Much as one may deplore such methods of securing the highest fruits of civilization—political and religious liberty—nevertheless, as Pradier Fodéré points out in most eloquent language, what right has one people to judge of the means that an-

other people must use in their struggle for constitutional government and human rights? Assuredly, it is but fair and just in weighing, both morally and legally, the rights of revolutionists to consider the measures taken by the government itself in its dealing with them. If a government regard it as within its province to suppress every attempt at insurrection by measures, the inhumanity of which is almost beyond conception, who shall say that the opposing party has gone beyond its rights in adopting similar measures”.

The suggestion of Grivaz to the effect that the rule should not be applied to acts committed in open warfare nor to retaliatory measures or reprisals would remedy the defect. It is also advisable for the various governments to agree upon a concrete definition of anarchistic acts. With such modifications as have been suggested and those which may be made from time to time as experience warrants, the rule may be made practicable. At least as between countries where democracy has already struck deep root there can be no serious objection to the application of such a rule. The Geneva resolutions may seem radical to some. But after all, the attitude of international society towards political offenders has undergone a tremendous change. The names of Kossuth and of Mazzini no longer have their romantic hold upon men's imagination as they used to have in the by-gone century. To paraphrase Mailfer, if political offences are not universally condemned it is because they are directed against a particular form of government and not against one based on popular sovereignty.

Too much emphasis cannot be laid upon the necessity of a concrete definition of political offences. The chief difficulty lies not so much in the absence of a criterion that can be universally applied as in the nature of the system of extradition itself. This fact has been overlooked by most writers. Professor A. S. Hershey clearly understood the situation when he suggested a thorough judicial investigation as the best possible solution to the problem. If all the circumstances of the case are brought to light at the hearing a fairly reasonable result could be reached. It is

the remoter political aspects of an offence that occasioned much trouble in the past. As a political refugee leaves his country hurriedly taking with him no evidence with which to fight his extradition should it ever come up, he should be given ample time, whenever his surrender is requested, to procure the necessary evidence in his behalf.

If, at times, our sentiment of justice is shocked by a denial to an offender of the right of asylum the blame cannot be laid upon the requested state. The accused may be a real patriot. But if he can produce no evidence to prove that he is in reality such his extradition must follow. On the other hand, a searching investigation would prevent ordinary criminals from taking cover under the cloak of politics to escape the consequences of their acts. Experience has shown that in all those cases where there had been a thorough investigation the results were fairly satisfactory.

There is ground for optimism, therefore, that the problem is not as difficult as it really is. Much clearing of the undergrowths, so to speak, has been done. The committing magistrate should not be satisfied with a single criterion. He should satisfy himself that the following questions are fully answered at the hearing: Is the offender actuated by a political motive? Is it his object to overthrow the government? Is the act incidental to, or connected with, the revolution? Is it committed in the interest thereof? Is it a retaliatory measure? Does the common law element preponderate over the political? Can the common element be separated from the political? Is the law violated essentially political in character? Is it in the interest of international society to surrender the accused? Other questions may be asked. If these tests do not suffice, we may profit from the confession of a brilliant judge¹ who informs us that in the adjudication of cases a judge draws upon philosophy and history and tradition and sociology for the attainment of a just result. Then, too, the subconscious forces, which most judges are unwilling to admit but which are none the less true, play an important part in the judicial process.

¹ Cardozo, Benjamin N., *The Nature of the Judicial Process*.

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